REPORTS

OF Hargrave

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

MVSEVM BRITANNICVM

VOLUME THE SIXTH.

Beginning with the Sittings before *Eaſter* Term 41 *Geo.* III. 1801, and
ending with the Sittings before *Eaſter* Term 42 *Geo.* III. 1802.

BY FRANCIS VESEY, JUN. ESQ.
OF LINCOLN'S INN,
BARRISTER AT LAW.

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ERRATA.

Vol. I.

Page 429, Line 18, For “There” read “In *Charlton* v. *Poulter*, 13th *June* 1753, Reg. Lib. 1752, A. Fol. 736”

Vol. V.

—— 446, —— 10, for “*William*” read “*Walter*”
—— 486, —— 2, from the bottom, for “1129” read “1829”
—— 672, —— 9, for “3,000” read “30,000”
—— 775, —— 7, from the bottom, for “*Boots*” read “*Voet*”
—— 877, —— 17, for “from” read “to”
—— 885, Table of Contents, column 2d, near the bottom, eraſe the head “Bankruptcy”

Vol. VI.

—— 51, The caſe put as Anonymous is *Pillſworth* v. *Hopton*
—— 52, note (*a*) for “*Lion*” read “*Leo*”
—— 76, line 21, for “at” read as”
—— 85, note (*b*) for “*Bro. Ch.*” read “*Pre. Ch.*”
—— 104, line 12, from the bottom, for “branch” read “breach”
—— 110, —— 30, for “than” read “then”
—— 114, —— 8, from bottom, for “entitled” read “not entitled”
—— 121, —— 4, from bottom, for “*alias*” read “*alios*”
—— 199, —— 10, 11, for “and the uſes declared to *Abraham Weekes* in fee” read “but no uſes were declared”
—— 246, —— 12, eraſe “it”
—— —— —— 13, for “does not” read “it does”
—— 312, —— 19, for “C. S. S.” read “O. S. S.”
—— 322, —— 15, for “this” read “his”
—— 338, —— 2, after “inaccurate” inſert a full ſtop
—— 402, —— 13, for “them” read “him”
—— 418, —— 5, eraſe the comma
—— 451, —— 16, for “proviſion of” read “proviſional”
—— 456, —— 7, from the bottom, after “impertinent” inſert “and”
—— 469, { 3, for “not” read “now”
{ 9, for “defendant” read “plaintiff”
—— 480, —— 24, for “accords” read “according”
—— 487, —— 2, from the bottom, after “ſubject” inſert to”
—— 531, note, 2 and 3 from the bottom, eraſe the marks of parentheſis
—— 533, line 6, for “1793” read “1799”
—— 555, —— 4, from the bottom, eraſe “to”
—— 556, —— 13, for “appealed” read “applied”
—— 577, note (*b*) after “*Char.*” inſert “2.”
—— 599, in the name of the caſe throughout, for “*Hoops*” read “*Koops*”
—— 636, line 16, eraſe “it”
—— 646, —— 17, for “deviſed” read “demiſed”
—— 733, —— 17, for “does” read “does not”
—— 738, —— 1, for “admin” read “adminiſtrator, who”
—— —— —— 2, after “debt” read “was due”
—— 757, —— 13, eraſe “than”
—— —— —— 14, before “appears” inſert “than”
—— 818, —— 3, from bottom, for “on” read “an”

ERRATA.

VOL. V.

Page 775. line 7. from the bottom, for "*Boote*" read "*Voet.*"
— 877. — 17. for "from" read "to."

VOL. VI. Part I.

— 52. note (*a*) for "*Lion*" read "*Leo.*"
— 76. line 21. for "at" read "as."
— 85. note (*b*) for "*Bro. Ch.*" read "*Pre. Ch.*"
— 104. line 12. from the bottom for "branch" read "breach."
— 110. — 30. for "than" read "then."
— 114. — 8. from bottom for "entitled" read "not entitled."
— 121. — 4. from bottom for "*alias*" read "*alios*".

SITTINGS BEFORE

Eaſter Term,

1801.

41 Geo. 3. 1801.

Lord Chancellor, Lord **Eldon**.
Maſter of the Rolls, { Sir **Richard Pepper Arden**. / Sir **William Grant**.
Appointed in the Vacation after *Eaſter* Term.
Attorney General, Sir **Edward Law**, Knt.
Solicitor General, The Honourable **Spencer Perceval**.

IN BANKRUPTCY.

Regulations in Bankruptcy.

The Lord **Chancellor** took the firſt occaſion of expreſſing ſtrong indignation at the frauds committed under cover of the bankrupt laws, and his determination to repreſs ſuch practices. Upon this ſubject his Lordſhip obſerved with warmth, that the abuſe of the bankrupt law is a diſgrace to the country, and it would be better at once to repeal all the ſtatutes, than to ſuffer them to be applied to ſuch purpoſes. There is no mercy to the eſtate. Nothing is leſs thought of than the object of the commiſſion. As they are frequently conducted in the country, they are little more than ſtock in trade for the commiſſioners, the aſſignees, and the ſolicitor. Inſtead of ſolicitors attending to their duty as miniſters of the Court, for they are ſo, commiſſions of bankruptcy are treated as matter of traffic: *A.* taking out the commiſſion; *B.* and *C.* to be his commiſſioners. They are conſidered as ſtock in trade; and calculations are made, how many commiſſions can be brought into the partnerſhip. Unleſs the Court holds a

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ſtrong hand over bankruptcy, particularly as adminiſtered in the country, it is itſelf acceſſary to as great a nuiſance as any known in the land; and known to paſs under the forms of its law. The puniſhment of the ſolicitor by ſtriking him off the roll is rendered merely nominal, by the common practice of others lending their names. It is too haſtily taken for granted, that the ſolicitor is entitled to his bill. In one Court of *Weſtminſter Hall* it was held, that if a ſolicitor undertakes to bring an action, or do any buſineſs, and part of the undertaking is, that he ſhall faithfully and honeſtly bring that buſineſs to a concluſion; if he fails in that, he cannot bring an action for any thing.

His Lordſhip added, that he was determined to make the officers of this Court reſponſible to the juſtice of the country for their dealings in this Court; and declared, with reference to the practice of lending a name to a perſon forbid by the Court to take out a commiſſion, that he would not heſitate to ſtrike a ſolicitor off the roll, who dares to lend his name to a perſon under ſuch an interdict; and for that reaſon alone: but he would go farther; and whenever a caſe of this nature ſhould be brought forward, would direct the Attorney General to proſecute for a conſpiracy; for no worſe conſpiracy can be than that, the object of which is to make what the Legiſlature intended as a lenient proceſs againſt the bankrupt a mode of defrauding the creditors and the bankrupt.

The paper of petitions in bankruptcy afforded too much foundation for theſe remarks. In *ex parte Stevens* (*a*), and *ex parte Kirſhaw* (*b*), the object of the petitions was to ſuperſede commiſſions of the deſcription alluded to by the Lord Chancellor. In the latter the commiſſion was taken out after a general aſſignment for the benefit of all the creditors: the effects were not above 80 or 90*l.*; and the petitioning creditors at firſt ſwore to a debt for goods ſold and delivered, and afterwards ſtated it to be money lent. The Lord Chancellor ordered, that the petition ſhould ſtand over, and that the ſolicitor, who ſued out the commiſſion, ſhould, if he thought fit, ſtate by affidavit, how he came to permit the petitioning creditor to make that miſtake in ſwearing to his debt; and what object he had in ſuing out the commiſſion. A ſimilar order was made in the other petition; and

(*a*) *April* 25. *June* 6. 1801. (*b*) *May* 4. 9. 1801.

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his Lordſhip declared, that upon a commiſſion ſo ſuſpicious in its circumſtances, he ſhould always expect the ſolicitor to give an account of his conduct. The ſolicitors in theſe commiſſions having accordingly made affidavits in ſome degree exculpating themſelves, the commiſſions were ſuperſeded at the expence of the reſpective petitioning creditors; and it was ordered, that the proceedings ſhould be kept in the office, and the bonds aſſigned.

In *ex parte Blackmore* (*a*), the bankrupt was a Lieutenant-Colonel of the Fencible Cavalry, and the petitioning creditor a Clergyman; and the trading was by dealing in horſes. The Lord Chancellor reprobated the commiſſion, as the reſult of a moſt diſhoneſt tranſaction, effected by procuring poor, ignorant, markſmen, to ſwear to the trading, *&c.*; and refuſed to permit the petitioning creditor to try the bankruptcy, unleſs he or the ſolicitor would previouſly ſatisfy the Court by affidavit, that they had made due inquiry with regard to the effects, the nature of the trading, and the other circumſtances.

With reſpect to the trading his Lordſhip ſaid, that if they could bring it to the caſe of the inn-keeper (*b*), that a jury could infer from ſome acts of ſelling, that he meant to ſell more, ſo as to conſtitute a general dealing, neither his ſituation in the army nor any other would prevent the effect of the bankrupt laws: but it could not be maintained, that if he bought a horſe, and ſent him to *Tatterſal*'s with the hope of getting a guinea or two more, that would make him a trader; or his buying horſes for his regiment, to make it look well. The laws were never meant to attach upon ſuch occaſional tranſactions; and the affidavit, upon which the bankruptcy was found, could not for an inſtant ſtand an examination at *niſi prius*.

In *ex parte Edwards* (*c*) alſo the circumſtances called forth the ſtrong animadverſion of the Court. The commiſſion was taken out in the country. One of the commiſſioners, who was a barriſter, reſident in the country, and two of the aſſignees, one of whom was alſo the ſolicitor, who ſued out the commiſſion, were partners in a country

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(*a*) *June* 6. 1801.

(*b*) *Saunderſon* v. *Rowles*, 4 *Bur.* 2064. *Buſcall* v. *Hogg*, 3 *Wilſ.* 146. *Patman* v. *Vaughan*, 1 *Term Rep. B. R.* 572.

(*c*) *June* 22d, *July* 3d, 1801.

bank;

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bank; into which the money received under the bankruptcy was paid; and an account was opened with the ſolicitor, as aſſignee, commencing in 1795, and continuing down to 1801; at which period the firm of the bank was reduced to the gentleman acting as commiſſioner; all the other partners having retired. The third aſſignee was a cuſtomer of the bank. The ſolicitor was in *October* 1797, under an order of the Lord Chancellor, diſcharged from the ſituation of aſſignee; but the balances were afterwards carried to his account. The petition was preſented by the new aſſignees; praying, that he and the other partners in the bank may be ordered to pay the reſpective balances due to the eſtate, and the coſts.

The Lord CHANCELLOR expreſſed ſtrong diſapprobation of the manner, in which this commiſſion was conducted, and eſpecially of the union of the characters of banker, commiſſioner, ſolicitor, and aſſignee; obſerving, that it is a moſt unwholeſome practice to permit an aſſignee to be removed as upon his own conſent, when the Court ought to remove him by its own act, upon motives of a different and a higher nature; and referring to the rule of courts of law, founded upon very good ſenſe, that an attorney ſhall not have his name ſtruck of the roll upon his own application, without an affidavit, that he does not apply under an apprehenſion, that an application will be made againſt him for that purpoſe (*a*). His Lordſhip farther declared, that aſſignees are chargeable with intereſt, upon all the principles of the Court, if they do not actively bring forward their accounts for the inſpection of the commiſſioners, without waiting for an application.

The petition was ordered to ſtand over, for the purpoſe of giving to the commiſſioner and the ſolicitor an opportunity of ſhewing cauſe by affidavit, why an order ſhould not be made, that no future commiſſion ſhould be directed to the former, and that the latter ſhould never be permitted to take out another commiſſion. Afterwards upon their affidavits the order was made againſt the ſolicitor only.

(*a*) That practice has been adopted by the Lord Chancellor in the caſe of a Solicitor *Ex parte Owen, poſt.*

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In *Michaelmas* Term the Lord Chancellor took notice, that the order (*a*), requiring two barriſters in every country commiſſion, had been evaded by putting in the names of two barriſters reſiding in town, who cannot attend; and directed, that when the name of any barriſter reſiding in town ſhall be put into a country commiſſion, it ſhall be attended with a certificate to the Great Seal, that he propoſes to act in that commiſſion.

In *ex parte Gibſon* (*b*) the bankrupt was an attorney: but the commiſſion was taken out againſt him by the deſcription of a cheeſemonger. The object of the petition was to ſtay the certificate; ſuggeſting, that the creditors of the bankrupt might not know him by the character, under which he was deſcribed. Afterwards, on the bankrupt's paying a ſum of money, the petition was withdrawn.

The Lord CHANCELLOR expreſſed ſtrong diſapprobation at the conduct of the ſolicitors for the petition; and ordered the petition to ſtand over, and advertiſements to be inſerted for the creditors. When the petition came on again, his Lordſhip directed, as a general order, that no petition preſented to ſtay a certificate ſhall ever be withdrawn without the leave of the Court; adding, that the parties ſhould ſwear, there were none of theſe tranſactions. His Lordſhip farther intimated, that though there is no authority, that a ſum of money given to withdraw an oppoſition to a certificate will vitiate the certificate in the ſame manner as money given to obtain it, that ſhould be conſidered; and alſo how the money paid by the bankrupt ſhould be reſtored to him, which certainly ought in ſome way to be effected. The petition was therefore ordered again to ſtand over. On the 11th of *February*, the order was made, that the bankrupt ſhould have his certificate, without prejudice to any application as to the money ſo paid by him.

That aſſignees under a commiſſion of bankruptcy cannot purchaſe for their own benefit either any part of the eſtate of the bankrupt or a creditor's right to the dividends, ſee *ex parte Hughes*, *ex parte Dumbell*, *ex parte Lacey*, *poſt*.

(*a*) See the order, *ante*, at the beginning of the 5th Volume.

(*b*) *January* 25th, 1802.

1801.

April 20th.

Lord ASHBURTON *v.* Lady ASHBURTON.

Perſonal property of an infant ordered to be laid out in the purchaſe of land; though there was no authority in the will for changing the nature of the property: but it was ordered, that the eſtate purchaſed ſhould be conveyed in truſt for the infant, his executors and adminiſtrators, till he ſhould attain 21, and afterwards for him and his heirs.

Lord *Aſhburton* by his will, dated the 4th of *April* 1780, taking notice, that he had engaged to ſettle 1,000*l.* a-year by way of jointure on Lady *Aſhburton*, directed an inveſtment in the funds or other ſecurities for that purpoſe; and not then having any iſſue he declared, that he left his real property to deſcend to his ſiſter; and his perſonal eſtate he gave to his father, in caſe he ſhould ſurvive him (the teſtator); if not, then to his ſiſter.

By a codicil, dated the 31ſt of *October* 1781, taking notice of the death of his father and the birth of a ſon, the teſtator gave directions for the maintenance and education of his ſon; and as to his real eſtate, which would deſcend to his ſon, deſired it might be under the care and management of his executors and guardians of his ſon; and, after giving 5,000*l.* to his ſiſter in addition to his note for that ſum, he gave all the reſidue of his perſonal eſtate to his executors, in truſt to place out the ſame and the rents and profits of his real eſtate in real or government ſecurities, as they ſhould from time to time judge beſt, during his ſon's minority; and out of the produce thereof or of any real eſtate to pay what they ſhould judge proper for his maintenance and education; the whole ſurplus to accumulate during his minority; and upon his attaining the age of 21 to pay, aſſign, and transfer, the whole principal and intereſt to him or his order: but in caſe he ſhould die under age, and the teſtator ſhould have no other child, who ſhould attain that age, he gave his wife, if then living, 20,000*l.* in lieu of her annuity, or 10,000*l.* in addition, at her option, and the whole reſidue with the accumulations to his ſiſter.

By another codicil, dated the 1ſt of *June* 1783, the teſtator taking notice of the death of his eldeſt ſon, and having a ſecond, ſubſtituted him for the other with the ſame diſpoſition over.

The teſtator died ſoon afterwards, poſſeſſed of very large property in the funds; leaving iſſue the preſent Lord *Aſhburton*, the ſon mentioned in the ſecond codicil; who when of the age of 18, preſented a petition, ſuggeſting an opportunity of laying out a conſiderable part of the ſaid ſums in the purchaſe of lands in the county of *Devon*, where all the reſt of the petitioner's landed property lies; and praying, that he may be at liberty, when and as convenient purchaſes may offer, to lay propoſals before the maſter for inveſting the funds in land.

Mr. *Romilly* in ſupport of the petition.

The Lord Chancellor aſked, whether there was any inſtance, in which the Court took upon itſelf to change the nature of the property in ſuch a caſe, where there was no clauſe in the will authoriſing it.

Mr. *Alexander (amicus curiæ)* ſaid, he had known orders upon this ſubject at the Rolls; and mentioned one caſe; in which the land purchaſed was directed to be conveyed to a truſtee, in truſt for the perſon intereſted, his executors and adminiſtrators, until he ſhould attain the age of 21, and afterwards for him and his heirs.

The Lord Chancellor approved that qualification; and made the order accordingly.

Ex parte LYTTLETON.

April 20th.

Acceſs to a lunatic by a perſon entitled upon the death of the lunatic in default of appointment by her, to ſee, whether ſhe was in a ſtate to exerciſe the power, refuſed.

One object of this petition in lunacy was, that the petitioner, who was entitled upon the death of the lunatic, in caſe ſhe ſhould not exerciſe a power of appointment, might have acceſs to the lunatic, either perſonally or by phyſicians, for the purpoſe of ſeeing, whether ſhe was in a ſtate to make an appointment.

Mr. *Agar* in ſupport of the petition.

The Lord Chancellor aſked, whether there was any inſtance of an order for acceſs to the lunatic upon the principle of *quia timet;* and, no inſtance being produced, his Lordſhip refuſed the application; obſerving, that ſuch a viſit may be very dangerous, and have a very bad effect in irritating the mind of the lunatic from the mere purpoſe of the viſit, without any intention of producing that effect.

April 20th.

Ex parte BAKER.

A liberal application of the property of a lunatic is to be made, to ſecure every comfort his ſituation will admit.

The Maſter by his report ſtated, that 300*l.* a-year was a proper allowance for the maintenance of the lunatic; who was in a private mad-houſe; where he had been placed by his grandmother, when he had no fortune; but at the date of the report his income was 1,700*l.* a-year. The particular nature of his diſorder was merely imbecility of mind in a great degree.

Lord Chancellor—I think this allowance too little; and that this gentleman is capable from his ſituation of being rendered more comfortable. I do not think it a judicious act in the Court to lay up 1,400*l.* a-year for the perſons, who may be the next of kin of the lunatic at his death; when his ſituation admits of greater comfort by a more liberal application of his property. It is harſh to confine him in ſuch a place; his diſorder not being ſuch as to require coercion, nor of nature, that gives much hope of his recovery; which might make the treatment given in ſuch a place expedient. I do not ſee, why this gentleman ſhould not be in a houſe of his own under the care of ſome relation.

Refer it to the maſter to review his report; and to conſider, whether it is not proper to apply a larger income to the maintenance of the lunatic (*a*).

(*a*) *Ex parte Chumley, ante,* vol. 1. 296.

Ex parte DYER.

April 20th.

A letter undertaking to accept bills held an acceptance.

THE petitioner ſold and ſhipped goods on account of *Kirkpatrick* of *Liverpool*, to be paid for by bills on *London*; and accordingly drew bills on the bankrupts before the bankruptcy; which were accepted, and paid. A farther ſum becoming due on the ſame account, he drew three other bills, all dated the 3d of *November* 1800, payable three months after date. On the 18th of *November* acceptance was refuſed; but by a letter of that date to the petitioner the bankrupts ſtated, that having now obtained the ſatisfaction from *Kirkpatrick* they wanted prior to accepting his bills indorſed to the petitioner he may return them to his correſpondent here, and they ſhall be accepted.

The bills were preſented again on the 21ſt of *November*; but they again refuſed to accept. On the 4th of *December* the commiſſion iſſued againſt them. A commiſſion alſo iſſued againſt *Kirkpatrick*. Upon the firſt refuſal the ſolicitor for the petitioner preſſed *Kirkpatrick* for ſome other mode of payment; but was aſſured by him and the agent of the bankrupts, that the objection to accepting was done away; and he read a letter from the bankrupts, ſtating, that they were fully ſatisfied with the explanation ſent them reſpecting *Kirkpatrick*, and they would now accept the bills, which they had before refuſed.

The object of the petition was to be admitted to prove under the commiſſion.

The Solicitor General in ſupport of the petition ſaid—This letter was a virtual acceptance, an expreſs undertaking by the perſons, upon whom the bills were drawn, that if they are returned, they will be accepted, and referred to *Pillans* v. *Van Mierop* (*a*).

Lord CHANCELLOR ſaid, it was ſo clearly ſettled at law, that ſuch a letter, an undertaking to accept, is an acceptance, that the aſſignees would hardly deſire to try it.

(*a*) 3 *Burr*. 1663.

1801.

Ex parte DYER.

Mr. Richards for the Aſſignees not deſiring to try it, the order was made according to the prayer of the petition.

April 18. 22.

POWNALL *v.* KING.

Order after an award to make the ſubmiſſion a rule of Court.

Mr. *Stanley* for the plaintiff moved to have the ſubmiſſion of the parties in this cauſe to arbitration made a rule of Court; an objection having been taken by the Regiſter, upon the caſe of *Spettigue* v. *Carpenter* (*a*), that, the award having been made, the application for this purpoſe is too late. The bond contained a ſubmiſſion to have the award made a rule of Court.

Mr. *Stanley* in ſupport of the motion, admitted, that the words of the act (*b*) are future; but ſaid, this objection had not been taken.

Mr. *Pemberton* for the defendant conſented to the motion.

Lord CHANCELLOR—The conſtant practice of both Courts of Law for years has been againſt this objection: but I am afraid, a deciſion of that kind is not ſufficient to overrule a deciſion of the Court, where the objection was made. I will look into this caſe. My preſent inclination is this: the Court can take no juriſdiction but in the caſes, in which the act gives it juriſdiction: but I have always underſtood, that if the ſubmiſſion bears date before the award, the Court will act upon that ſubmiſſion. The conſent cannot give the Court a juriſdiction, the act of Parliament does not give it.

April 22d. Lord CHANCELLOR—It ſeems to me, that this ſubmiſſion may be made a rule of the Court: 1ſt, it is not inconſiſtent with the words of the ſtatute: 2dly, I think, the caſe in *Peere Williams* does not neceſſarily decide the point ſuppoſed to be decided; and in *Alardes* v. *Campbel* (*c*) the objection was taken, that the ſubmiſſion was made a rule of Court after the award; and the Court treated

(*a*) 3 *P. Will.* 361.

(*b*) 9 & 10 *Will.* 3. *c.* 15.

(*c*) 1 *Barnard, Rep. K. B.* 152.

it as a point of no difficulty; conſidering it as no objection within the ſtatute, and according to the conſtant practice; and in *Chicote* v. *Lequeſne* (a) it is conſidered by Lord *Hardwicke* as the conſtant practice. Independent of that, I think, by the conſent of the parties this might be made a rule of the Court; to be enforced, not perhaps by the proceſs under the ſtatute, but by the common proceſs of the Court.

Ordered.

(a) 2 *Veſ.* 315.

Ex parte OWEN.

April 24th.

The Court will not ſtrike a ſolicitor off the roll at his own requeſt without an affidavit, that there is no other reaſon for the application.

Mr. *Owen* moved, as of courſe, that a ſolicitor may be ſtruck off the roll at his own requeſt.

Lord Chancellor—That will not do, without an affidavit, that there is no other reaſon for it; for a ſolicitor apprehending, that an application will be made againſt him, may deſire to be ſtruck off the roll. Therefore the Courts of law have required upon an application by an attorney to be ſtruck off the roll, that they ſhall be ſatisfied, there is no other reaſon; and I ſhall accordingly require an affidavit, that he does not apply under an apprehenſion, that ſomebody elſe will.

Mr. *Owen* ſaid, there was not the leaſt ground for ſuch an apprehenſion in this inſtance: this gentleman had not practiſed for two years, and made the application with a view to be called to the Bar.

Lord Chancellor ſaid, for that reaſon he ſhould the more require the affidavit; for, when it is inſiſted on in ſuch a caſe, no objection can be made in any other.

COOTH *v.* JACKSON.

1800. *Jan.* 29th. 1801. *April* 28, 29.

To a bill for ſpecific performance of an agreement a plea of the ſtatute of frauds, being coupled with another defence, was ordered to ſtand till the hearing.

Bill for ſpecific performance of an agreement originating in communications by the commiſſioners, who took the depoſitions in a cauſe, and by the witneſſes, to the defendant as to the nature and effect of the evidence. Though the plaintiff was not implicated in the tranſaction, the bill was diſmiſſed on grounds of public policy.

THE bill ſtated, that in 1795 a bill was filed by the plaintiff *Edmund Cooth* againſt the reverend *Richard Jackſon* and the reverend *Gilbert Jackſon*, the latter being the only ſon and heir of *Gilbert Jackſon*, the ſurviving truſtee in a marriage ſettlement, under which the plaintiff claimed premiſes, called *Lye Farm* and *Burnthouſe Farm*, by virtue of a limitation in remainder, ſubject to the life eſtate of *Richard Jackſon*, and in default of iſſue of him and his wife, for the benefit of *John Cooth*, the plaintiff's father, deceaſed, and the heirs of his body. That bill ſtated, that all the children of *Richard Jackſon* died in their infancy without iſſue, and then his wife died without leaving any iſſue; and *Richard Jackſon* continued in poſſeſſion. He and his wife ſoon after their marriage levied a fine; and declared the uſes in failure of iſſue of them to the ſurvivor.

The bill farther ſtated, that *Gilbert Jackſon* acknowledged to the plaintiff, that ſuch ſettlement was in his poſſeſſion; and *Richard Jackſon* after the deceaſe of his wife wrote ſeveral letters acknowledging, that he was entitled only for life; and that after his death *Cooth* would be entitled; and he alſo acknowledged, that he had accepted from *Charles Cooth*, the plaintiff's elder brother, who died without iſſue, a mortgage of the reverſion for money lent. The bill alſo ſtated, that *Richard Jackſon* endeavoured to get *Charles Cooth* to execute a will in his favour; and never ſuggeſted, that any ſettlement was in exiſtence, or that any fine had been levied to bar the limitations thereof; and he never ſet up any claim under the fine until after the death of the truſtees in the ſettlement, and until after *Richard* and *Gilbert Jackſon* had got both parts of the ſaid marriage ſettlement into their hands, and ſuppreſſed the ſame. The bill prayed a diſcovery; and that the defendant might be decreed to leave the ſettlement in the hands of the Maſter; and that the right of the plaintiff might be declared.

The bill farther ſtated, that to that bill the defendant put in an anſwer; and afterwards, upon the 19th of *September* 1796, *Richard Jackſon* died; having deviſed the eſtate to *Gilbert Jackſon*; who was alſo his nephew and heir at law. A bill of revivor and ſupplement was filed; ſtating the above matters; and that *Gilbert Jackſon* poſſeſſed himſelf of the ſettlement; and praying accordingly. An anſwer was put in to that bill; and a commiſſion iſſued, directed to *Thomas Bartlett* and *Thomas Gould Reade*, commiſſioners named on the part of the plaintiff, and to *James Still* and *Joſeph Charles Still*, commiſſioners named on the part of the defendant. The three commiſſioners firſt mentioned met and executed the commiſſion upon the 30th and 31ſt of *October* 1798; and the examination was made up and cloſed, but never returned. After all the witneſſes were examined, the defendant propoſed a compromiſe by dividing the ſaid farms and lands: the plaintiff accepted the propoſal; and it was thereupon agreed, that the plaintiff ſhould take the whole *Burnthouſe* farm and ſo much of the *Lye* farm as ſhould make up an equivalent to a moiety of the whole; and that the defendant ſhould retain the remainder; and it was farther agreed, that the commiſſioners ſhould not return the commiſſion; and that all proceedings in the ſuit ſhould ceaſe. Upon the ſaid agreement being concluded the defendant and plaintiff named *Bartlett*, *Reade*, and *James Still* to divide and allot the ſaid farms and lands between *Jackſon* and the plaintiff in manner aforeſaid, and to arbitrate and ſettle all matters between them incident to ſuch diviſion and allotment. *Bartlett*, *Reade*, and *Still* accepted the appointment of arbitrators; and undertook to divide and allot ſaid farms and lands, as aforeſaid; and mutual bonds of arbitration were executed to abide by and perform the award and final determination of the ſaid arbitrators.

The bill farther ſtated, that though the bonds purported to be to ſubmit to the award of the arbitrators to be made of all matters in difference, yet they were intended to relate to their diviſion of the ſaid farms, &c. between the plaintiff and *Jackſon*: all other matters, which had been in difference between them, being at that time ended by the aforeſaid agreement; and the bonds were executed for no other purpoſe than to bind them to abide by the allotment and diviſion of the ſaid farms, &c. In purſuance and part performance of the ſaid agreement, the ſaid commiſſion ſo made up and cloſed by the ſaid commiſſioners hath never been returned; and in farther purſuance of the ſaid agreement the 14th of *November* 1798 was appointed for a meeting of *Bartlett*, *Read*, and *Still*, to proceed to make the allotment, &c. of the ſaid premiſes, as aforeſaid, and to make their award upon ſaid arbitration; and in the mean time *Still*, *Bartlett*, and *Reade*, but particularly *Still*, went over the whole of the premiſes; and formed an eſtimate of the value; and marked out part of the *Lye* farm, to be allotted and added to the *Burnthouſe* farm, &c.: but *Bartlett* and *Reade* miſtook the day; and in conſequence did not attend the meeting: but it was attended by *Still* and the plaintiff. The meeting was adjourned to the 22d of *December* 1798; and in the mean time *Still*, *Bartlett*, and *Reade*, cauſed the lands to be ſurveyed and valued, for the purpoſe of making their award and concluding ſaid buſineſs upon the ſaid 22d of *December* 1798. They did meet accordingly; the plaintiff was preſent: but *Jackſon* did not come; and they were ready to ſettle the allotment and diviſion, and make their award; but *Jackſon* cauſed his ſolicitor to write to the arbitrators, that he ſhould not abide by their award; which letters they received a few days before the 22d of *December*. The meeting was therefore adjourned to the 31ſt of *December*. Notice in writing, ſigned by the arbitrators, was given to *Jackſon*; but before that day he prevailed upon *Still* to refuſe joining in the award; and he informed the other arbitrators, he would not join, and ſhould not attend. The other two arbitrators met on that day but as *Still* did not attend, no award was made.

The bill then ſtating, that the plaintiff was always ready to perform his part, prayed, that the defendant may be decreed to perform the agreement; and that the ſaid two farms may be divided into two equal parts; and that the *Burnthouſe* farm, with ſo much of the other farm as ſhall render the ſame of equal value with the remainder of the latter, may be decreed to the plaintiff; with the neceſſary directions and a production of all title deeds.

To this bill the defendant put in the following plea and anſwer.

As to ſo much of the bill as ſeeks, that the defendant may be decreed to perform the agreement alleged, &c. and that the ſaid two farms may be divided into two equal parts, and that the *Burnthouſe* farm, with ſo much of the *Lye* farm as ſhall together be equal to the remainder of the *Lye* farm, may be decreed to belong to the plaintiff and his heirs, and a commiſſion for making ſuch diviſion, with the neceſſary directions for that purpoſe, and that the title deeds and writings relating to the ſaid eſtates may be produced and left with the maſter, or any other relief founded upon the ſaid agreement, the defendant pleaded in bar the ſtatute of frauds (*a*); with an averment, that there was no contract in writing concerning any diviſion of the ſaid two farms, *&c.*

The defendant admitted the proceedings in the former ſuit; and ſtated, that being adviſed, that it was not neceſſary for him to produce witneſſes at the execution of the commiſſion, he attended, unaccompanied by his ſolicitor, with *James Still*, one of the commiſſioners, named by or on behalf of the defendant. The two commiſſioners named by or on behalf of the plaintiff met them; and examined witneſſes; and the commiſſion was cloſed. In *October* 1798, on the laſt day of executing the commiſſion, after the commiſſion was made up and cloſed, *Smith*, who had been examined as a witneſs for the plaintiff, came to the defendant, and propoſed, and preſſed him, as he had frequently done, to compromiſe the cauſe; intimating, that, if the cauſe proceeded to a hearing, ſuch a ſtring of evidence would be brought forward, as would ruin his uncle's (*Richard Jackſon*) character for ever; and that a ſettlement of the eſtates in diſpute had been made, which was in favour of the plaintiff's father; and that the defendant's ſaid uncle and his wife had upon ſome occaſion made an affidavit thereof. The defendant ſaying, he muſt take the advice of his ſolicitor, *Smith* intimated, that, if the cauſe was not immediately ſettled, the plaintiff would probably afterwards refuſe to ſettle it. *James Still* ſhortly afterwards called the defendant into his room; and alſo recommended to him to ſettle the cauſe on account of the evidence, which he intimated to the defendant had been adduced on the part of the plaintiff; and *Still* not having prevailed upon the defendant to agree to ſettle it, *Smith* came again, and brought *Ridcout*, another witneſs for the plaintiff; and they preſſed the defendant with the ſame arguments; and particularly, that his late uncle had written ſeveral letters (which had been proved under the commiſſion), which were in contradiction to his anſwer in the cauſe; and that, if the cauſe proceeded, and the letters were brought into Court, his character would be ruined. During the

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(*a*) 29 *Char.* 2. *c.* 3.

execution of the commiſſion *Bartlett* and *Reade* ſeverally recommended the defendant to compromiſe the ſuit; and the defendant being greatly alarmed at ſuch repreſentations, and believing them true, though he now believes them unfounded, and being very anxious, that nothing ſhould be brought forward, which might affect the character of his uncle, and believing, that *Smith* was his friend, and well acquainted with the facts urged by him, he did at length, and for ſuch reaſons, (and which otherwiſe he would not have done) propoſe to the plaintiff and verbally agree to ſettle ſaid ſuit, by dividing the eſtate in diſpute between them; to which the plaintiff acceded; and thereupon ſuch bonds of arbitration were entered into. It was underſtood by the defendant, and, as he believes, by the plaintiff, that the baſis, upon which the arbitrators would proceed to ſettle the differences referred to them, was by making an equal diviſion of the property in queſtion between the plaintiff and the defendant; and that ſaid bonds were intended to relate only to ſuch diviſion, and to bind the defendant and the plaintiff by ſuch allotment and diviſion, as ſaid arbitrators ſhould make between them; all other matters being then agreed to be ſettled between them. The defendant did not attend the adjourned meeting. He admits the notice of the laſt adjournment; and that *Still* did not attend, and would not join in the award, in conſequence of the repreſentations made to him by and on behalf of the defendant, and of his conviction of the impropriety of ſo doing; having declared to the defendant, that he was ignorant of ſome important facts, when he recommended to the defendant the compromiſe. It may be true, that between the time of entering into the bonds and the 14th of *November* 1798, the day firſt appointed for making the arbitration, the arbitrators, and particularly *Still*, did go over the premiſes, and value the ſame, and mark out great part of ſo much of the great farm, called *Lye*, as was (as is pretended by the bill) to be allotted and added to the *Burnthouſe* farm; in order that the premiſes might be divided into moieties equivalent in quantity and value between the defendant and the plaintiff; and that between the 14th of *November* and the 22d of *December* they cauſed the lands to be ſurveyed and valued for the purpoſe of making the award.

The anſwer then inſiſted, that the not returning the commiſſion and the circumſtances aforeſaid are not to be conſidered as done in performance of the ſaid agreement, eſpecially as the defendant was led to compromiſe the ſuit by ſuch unfounded repreſentations, ſo as to take the caſe out of the ſtatute.

1800.
Jan. 29th.

This cauſe was ſet down upon the plea; which was ſupported by Mr. *Manſfield* and Mr. *Stratford*. The Attorney General and Mr. *Hart* for the plaintiff inſiſted, that the agreement being admitted by the anſwer, and being in part performed by the plaintiff, as far as he could perform it, by not proceeding to the examination of witneſſes, the commiſſioners proceeding no farther, and the depoſitions taken not being returned, the caſe was not within the ſtatute; and if the defendant was improperly induced to come to the agreement, that is a diſtinct defence, and waives the benefit of the plea. The bonds of arbitration are certainly in their terms general, for all matters in diſpute: but nothing remained between them but the diviſion of the land; for it was expreſsly agreed, the ſuit ſhould be put an end to; that there ſhould be no farther proceedings; and the land ſhould be equally divided between them.

Lord *Loughborough*'s opinion, that upon a bill for ſpecific performance of a parol agreement within the ſtatute of frauds, the defendant, though admitting the agreement by his anſwer, may, if he inſiſts upon the ſtatute, have the benefit of it at the hearing.

Lord CHANCELLOR (a)—This is a double defence. I cannot allow the plea of the ſtatute, where it is coupled with another defence. There is no purpoſe in pleading it. He may have the benefit of the ſtatute at the hearing. He ſays diſtinctly, he was drawn in by miſrepreſentation. It ſtruck me at firſt, he would have done better to have demurred; for I do not conceive, how the bill can be ſuſtained. The conſequence of there being no award is, that the ſuit muſt go on. Upon the caſe made by this bill the ſtrict decree would be to order another reference; for upon the ſtate of the caſe there is a diviſion to be made of the eſtate by giving one farm to one, another to the other, and making up the difference in value. The reference being abortive, the ſuit muſt go on.

Whether bonds of arbitration are ſufficient to take the caſe of an agreement out of the ſtatute of frauds, *Quære*.

I ſhould not wiſh to decide it now; but I have great doubt, whether the executing the bonds of arbitration is not a writing. Suppoſe a bond of reference to a ſurveyor, the price to depend upon his valuation, only to aſcertain, how much an acre the purchaſer was to pay for the land: that I ſhould conceive, not within the ſtatute. There is a writing, and a ſolemn writing, a deed, between the parties. Then the only queſtion is as to the object of it. It is to ſettle the price and terms upon an agreement concluded between the parties. I do not wiſh at the moment to decide it; as there is a complicated defence here; and reſerving the benefit of the plea to the hearing I keep the queſtion entire.

(a) Lord *Loughborough*.

1800.
Jan. 29th.

The plea was ordered to ſtand over till the hearing of the cauſe; and the parties went into evidence.

Reade, one of the arbitrators, by his depoſitions ſtated, that the propoſal for a compromiſe was made by the defendant to the plaintiff voluntarily; and it did not appear to the deponent, that the defendant was in any manner forced or conſtrained to make the ſame. It having been ſuggeſted by ſome of the friends of the plaintiff and defendant, after the commiſſion was cloſed, that it would be for the intereſt of both to put an end to the diſpute, it was at laſt propoſed by the defendant, and agreed to by the plaintiff, that an equal diviſion of the eſtate ſhould be made; *viz.* that the plaintiff ſhould take the *Burnthouſe* farm and ſo much of the *Lye* as ſhould make up an equivalent to a moiety of the whole; and that the defendant ſhould take the remainder; and it was alſo agreed, that the commiſſion ſhould not be returned; that all proceedings ſhould ceaſe; and the deponent, *Bartlett*, and *Still*, were requeſted by the plaintiff and the defendant to take the charge of dividing and allotting the land in equal moieties, purſuant to the agreement; and for that purpoſe bonds were entered into for leaving all matters and things in diſpute between the parties to their arbitration; and *Still* living near the ſpot agreed to look over the eſtate and make a valuation. The defendant was neither forced nor ſurpriſed into the agreement; and next day expreſſed himſelf much ſatisfied at it. The purpoſe of executing the bonds was, that the eſtate ſhould be equally divided according to the ſaid agreement. The deponent does not know of any other matter in difference but the diviſion and allotment of the eſtate.

Lord Loughborough's opinion, that upon a bill for ſpecific performance of a parol agreement within the ſtatute of frauds, the defendant, though admitting the agreement by his anſwer, may, if he inſiſts upon the ſtatute, have the benefit of it at the hearing.

Whether bonds of arbitration are ſufficient to take the caſe of an agreement out of the ſtatute of frauds. Quære.

This witneſs alſo ſtated the adjournment, the reaſon for not making the award, *viz.* that *Still* would not join, and the other circumſtances, which were alſo proved by the other witneſſes.

Charles Bowles gave the ſame account as *Reade* of the propoſal for the compromiſe, the terms of diviſion, &c. and that the defendant was not forced into it. He ſtated, that *Still* propoſed, that, though it might be too much trouble to make ſpecial bonds, ſtating all the circumſtances, yet it would be better to fill up the common printed bonds to bind them to the agreement; which were provided, and filled up accordingly. It was propoſed, that all the papers and pleadings in the cauſe ſhould at this meeting be deſtroyed: but it was afterwards agreed, that they ſhould remain, till after the diviſion ſhould be finally adjuſted. No ſubject of difference remained but the allotment and diviſion.

Bartlett ſtated, that, whether the propoſal of the defendant and the agreement were made freely and voluntarily, or in conſequence of any recommendation to him for that purpoſe, or, whether he was forced or conſtrained, or ſurpriſed or impoſed upon, in it, the deponent does not know. The next day he expreſſed himſelf ſatisfied with it. The deponent does not know of any thing elſe in diſpute between the parties.

James Still, being produced as a witneſs for the defendant, ſtated, that he and the other commiſſioners during the execution of the commiſſion had frequent converſations reſpecting the contents of ſome of the late Dr. *Jackſon*'s letters; and they agreed, that, if it could be brought about, it was a cauſe very proper to go to a reference; and he undertook to ſpeak to the defendant upon the ſubject; and accordingly went to the defendant in a room in the inn, where the commiſſion was executing; and mentioned to him, that it would be a very diſagreeable thing for the cauſe to come to a hearing on account of Dr. *Jackſon*'s letters, and his anſwer to the bill; and upon that account adviſed him to conſent to a reference; but uſed no perſuaſion; but recommended to him to conſult his friends, before he decided. The deponent believes, he did conſult *Smith* and *Rideout*; and that in conſequence of the converſation with them he was induced to agree to an amicable adjuſtment, and make ſuch propoſal.

Rideout

Ridout depoſed, that the deponent having been examined as a witneſs under the commiſſion on the part of the plaintiff had divers converſations with the defendant reſpecting the matters in queſtion in the cauſe; and, a compromiſe having been talked of, the deponent at the deſire of the defendant walked out into the town; and the defendant aſking his opinion, he aſked, whether the defendant had conſulted his commiſſioner, as the moſt proper judge. The defendant ſaid, he had; and his commiſſioner adviſed him to the compromiſe; and aſking the deponent, what he would do in ſuch a caſe, the deponent ſaid, he would agree to the compromiſe; and in a ſubſequent converſation ſaid, he ſhould agree to the compromiſe, if it was only for the ſake of his uncle's memory.

Smith depoſed, that, the defendant aſking his advice, he repeated the ſame arguments and advice he often had given before, when conſulted, *viz.* to compromiſe. Upon the ſecond day of the commiſſion the defendant informed him, that his commiſſioner *Still* ſaid, he adviſed him to put an end to the ſuit; but added, "Remember, I do not perſuade you." The defendant requeſted the deponent to aſk *Still*, what he meant by the word "*perſuade*." *Still* replied, "Would he have me force him to do it? Tell him, "it is my decided opinion, that he ſhould make it up."

1801. *April* 28th. Upon this evidence the cauſe came on before Lord *Eldon*.

Mr. Romilly and Mr. Hart for the Plaintiff.—This bill ſtands upon three points: 1ſt, Though the defendant inſiſts upon the ſtatute by the anſwer, yet the admiſſion of the parol agreement takes the caſe out of the ſtatute: 2dly, The agreement is in part performed: 3dly, There is a ſufficient agreement in writing.

The firſt point has been frequently diſcuſſed in this Court; but never decided. The doubts Lord *Thurlow* entertained, and the declarations of Lord *Hardwicke*, are in oppoſition to what is now ſuppoſed the law of the Court; that a defendant admitting a parol agreement by his anſwer can inſiſt upon the ſtatute. The caſe, that approaches neareſt to this point, is *Moore* v. *Edwards* (a). The late Lord Chancellor there did not conſider himſelf as deciding the point: but he ſtated, that it was not decided the other way. The point was not expreſsly decided by Lord *Hardwicke*: but he has ſaid in many caſes, particularly (*a*) in the *Attorney General* v. *Day*, that where the party admits the agreement, he ſhall be compelled to perform it, becauſe there is no danger of perjury. The ſame thing is ſtated by Sir *John Strange* (*b*) in *Potter* v. *Potter*. In *Symondſon* v. *Tweed* (*c*) a parol agreement admitted was performed by the Court. In *Whitchurch* v. *Bevis* (*d*), and *Whitbread* v. *Brockhurſt* (*e*) Lord *Thurlow* expreſſed great doubt upon this ſubject. The queſtion in thoſe caſes was, whether the defendant could be compelled to anſwer. Upon that his Lordſhip entertained great doubt. The difficulty however perhaps is not ſo great; for if the agreement is in part performed, then it is clear, the Court will perform it: but if the defendant can deny the part performance in purſuance of the ſuppoſed or any other agreement, then he need not be under the neceſſity of anſwering. It is not however neceſſary to enter into that; for this defendant has anſwered; and admitted a parol agreement. It is of very great importance, that this queſtion upon the ſtatute, as to the effect of ſuch admiſſion, ſhould be decided. Great doubt has at different times been entertained upon it. Mr. *Fonblanque* in a note (*f*) has collected the caſes upon this ſubject; and it does not appear there, or in another note (*g*) upon the ſame ſubject ſeveral years afterwards, that this point has been decided. Upon the ſeveral *dicta* of Lord *Hardwicke* and Sir *John Strange*, that, where the defendant admits the agreement, the caſe is entirely out of the ſtatute, it will be ſaid, that is confined to the caſe, where admitting the agreement he does not inſiſt on the ſtatute. What is the ground of that diſtinction? The ſtatute is a public ſtatute. A deciſion upon ſuch grounds would create a ſtrictneſs in pleading, that certainly has not prevailed, at leaſt as to anſwers. The defendant cannot be precluded from inſiſting upon the ſtatute, merely becauſe he has not ſtated it in his anſwer. The ſtatute of limitations bears a very ſtrict analogy to this. All a defendant has occaſion to aver is, that he has not promiſed within the laſt ſix years, without taking notice of the ſtatute.

(a) *Ante*, vol. 4. 23.

(*a*) 1 *Veſ.* 221.
(*b*) 1 *Veſ.* 441.
(*c*) *Pre. Ch.* 374. *Gilb.* 35.
(*d*) 2 *Bro. C. C.* 559.
(*e*) 1 *Bro. C. C.* 404.
(*f*) 1 *Fonb. Treat. Eq.* Ed. 1. 168 note (*d*), 171 note (*e*). Ed. 2, 178 note (*d*), 182 note (*e*).
(*g*) *Ante*, vol. 3. 39.

1801.
Cooth
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This queſtion depends upon the fourth ſection of the ſtatute. That ſection and the ſeventh are of the ſame nature, very different from other ſections requiring inſtruments to be executed with certain ceremonies, and deſtroying the inſtrument, if the ſtatute in thoſe reſpects is not complied with. But the fourth and ſeventh ſections are manifeſtly a law of evidence. The latter has the expreſſion "manifeſted and proved." Agreements have been repeatedly carried into execution, where there has been no contract in writing, but evidence in writing; as in *Tawney* v. *Crowther* (*a*). *Seagood* v. *Meale* (*b*) is the caſe of a letter, not to the party, with whom the defendant contracted, but to his own agent. Unqueſtionably that could not be more than evidence of an agreement; and Lord *Hardwicke* ſo ſtates it. So, in the caſe of part performance; upon which the other acts. I do not find any caſe upon the fourth ſection of the ſtatute, where the party admitted the agreement, but inſiſted on the ſtatute. In *Cottington* v. *Fletcher* (*c*) that very point was decided upon the other ſection as to declarations of truſt. It may be ſaid, that if he ought to be compelled to perform the agreement, if confeſſed, it would be abſurd not to compel him to anſwer to the fact of an agreement: but where is the abſurdity of compelling him to anſwer that fact? This has been put with great force by Mr. *Fonblanque*; that the ſtatute was made to prevent perjury; and as the anſwer cannot be falſified, there is a ſtrong temptation to perjury; and that has been adopted in *Rondeau* v. *Wyatt* (*a*). The ſtatute was certainly made to prevent perjury: but it was alſo made to prevent fraud by the means of perjury. The argument on the ground of avoiding the temptation to perjury would put an end to all diſcovery in this Court. The temptation to perjury in putting in an anſwer is infinitely ſtronger in many caſes than in that of a parol agreement; as, where a groſs fraud is imputed to the defendant. An anſwer in Chancery is in this reſpect juſt the ſame as a plea at law, except in the circumſtance, that the former is put in on oath. It is quite clear, that, if he had denied this agreement by his anſwer, the plaintiff might have produced a letter, for inſtance, to his agent. Suppoſe, in that letter he had ſaid, he would not perform the agreement on account of the ſtatute: can there be a doubt, that would be ſufficient evidence, upon which the Court

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(*a*) 3 *Bro. C. C.* 161. 318. *Forſter* v. *Hale*, *ante*, vol. 4. 696. vol. 5. 308.

(*b*) *Pre. Ch.* 560.

(*c*) 2 *Atk.* 155.

(*d*) 2 *Hen. Black.* 63.

would compel him to execute it? If that is ſo, is it not infinitely ſtronger, when the defendant in his anſwer upon oath admits the agreement; talking however about the ſtatute? It is ſuppoſed, that great inconvenience might follow from this; which was alſo ſaid in *Whitchurch* v. *Beirs*, and *Whitbread* v. *Brockhurſt*: but there is no inconvenience, even if the plaintiff ſtates a fictitious agreement. He muſt know, that he muſt prove, not only the circumſtances of part performance, but likewiſe the agreement; and he could not complain, if his bill was diſmiſſed, becauſe he could not prove the eſſential part of his caſe. If there were a part performance, it would be clearly competent to prove the agreement.

This depends very much upon principle and general reaſoning. A very high authority, *Poithier*, in his Treatiſe upon Obligations, puts this caſe. By the *French* law an agreement was not binding for any ſum exceeding 100 livres, unleſs it was in writing. *Poithier* ſays, that does not apply, where the party admits the agreement; and the other has a right to make him give his oath, whether he did enter into ſuch agreement; this being a law of evidence. But there is an agreement in writing; and that opinion was intimated by the late Lord Chancellor upon the former occaſion. The anſwer admits, there was no matter in diſpute but the diviſion of the eſtate. It has never been decided, that, where there is an ambiguity upon the face of the written agreement, which muſt be cleared up by evidence, you may not put queſtions to the defendant as to that ambiguity. In *Brodie* v. *St. Paul* (*a*) it was not ſuggeſted, that, if the defendant had admitted, that certain covenants were read, and there was no diſpute about the terms, the Court would not have executed it. Suppoſe an ambiguity occaſioned by a chaſm left for the price, to be afterwards agreed upon, or to be fixed by ſome third perſon, as in a late caſe (*b*) at the Rolls: ſome evidence is neceſſary.

The circumſtances of part performance are the delay, the not publiſhing the depoſitions, and not hearing the cauſe: next, the execution of the bonds: the attendance of the arbitrators; and all the trouble and expence ariſing from the bonds of arbitration. It is extremely difficult to ſay, upon what ground the caſes of

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(*a*) *Ante*, vol. 1. 326.

(*b*) *Emery* v. *Waſe*, *ante*, vol. 5. 846.

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part performance have proceeded; and it is much to be lamented, that the Court has not given the ſame relief in thoſe as in other caſes of fraud. But certainly they have not proceeded upon the ground of compenſation, where there might be complete compenſation. There can be no difference between this caſe and thoſe, where upon the circumſtance of poſſeſſion delivered the Court has performed the whole agreement. No ſpecific acts have been pointed out. Either acts or omiſſions will be ſufficient to bind the conſcience of the defendant. How can the Court know the prejudice to the plaintiff?

Lord CHANCELLOR—Which agreement am I to execute? The agreement proved and the agreement admitted are very different in their terms: the one leaves it to the arbitrators to divide, as they pleaſe: the other compels them to form particular lots. Do you remember any caſe, in which the bill ſtates one agreement, the anſwer ſtates a different agreement, and the plaintiff proves another agreement different from either, and that has been performed? There has been a caſe, in which the anſwer having admitted an agreement different from that ſtated by the bill, that has been taken up by the bill by amendment, and a performance decreed.

For the Plaintiff—In *Mortimer* v. *Orchard* (*a*) one agreement was ſtated, another admitted, and another proved by a ſingle witneſs; and the Lord Chancellor bound the defendants by the admiſſion.

The impropriety of commiſſioners diſcloſing the evidence muſt be admitted: but the plaintiff is clear of all ſuſpicion with reſpect to that. The defendant acted under apprehenſions raiſed by knowledge improperly obtained: but that cannot excuſe him; the plaintiff being innocent, and not implicated in the tranſaction. Upon this part of the cauſe, in *Mortimer* v. *Capper* (*b*) there is a caſe cited (*c*) by Lord *Thurlow*; which, as ſtated in the Report, is not very intelligible: but by a manuſcript note of *Mortimer* v. *Capper*, Lord *Thurlow* appears to have ſtated it thus. A common was to be incloſed. One man, having a right of common, agreed, before the commiſſioners had made any allotment, or any one could

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(*a*) *Ante*, vol. 2. 243.
(*b*) 1 *Bro. C. C.* 156.
(*c*) 1 *Bro. C. C.* 158.

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know, what it was to be, to ſell his allotment for 20 *l.* Afterwards it turned out to be worth 200 *l.* Sir *Joſeph Jekyll* ſaid, the contract ought to be enforced; as no one could know, what the allotment would be; and both parties were equally in the dark: but it might be very different, if the circumſtances had been known to the plaintiff. That caſe applies ſtrongly to this. So do *Beckley* v. *Newland* (*a*) and *Jones* v. *Randall* (*b*); and if the circumſtance, that the latter is the caſe of a wager, makes any difference, it is in favour of this plaintiff; who having a conſiderable property at ſtake, and deſirous by taking half of the eſtate to reduce what was uncertain to a certainty, enters into this agreement without any advantage over the other party; who, particularly when his conduct in obtaining that information from the commiſſioner's witneſſes is conſidered, cannot ſay, this agreement was improper. It muſt be preſumed, that he now refuſes to perform it upon ſome farther information obtained.

Mr. Manſfield and Mr. Stratford for the Defendant—The moſt important queſtion is, whether this agreement can be ſuſtained by the Court; conſidering the manner, in which it was obtained; whether the Court will ſuffer its own officer in the exerciſe of the authority delegated to him by the Court, availing himſelf of the information derived thereby, to go to either party, and recommend him from what paſſes in the cauſe to ſettle it. The policy of the law will never permit an agreement made under ſuch impreſſions to ſtand. The opinion and advice, under which the defendant acted, comes from a commiſſioner, bound to keep it ſecret. He happens to be the commiſſioner named by the defendant: but he is the commiſſioner of the Court. If commiſſioners can do this, what an opening for fraud and bribery! The defendant was forced into this agreement. What ſtronger argument could they uſe? The commiſſioner gave his decided opinion; knowing all the evidence; this defendant a clergyman; and no ſolicitor attending on his part. What imputation can there be upon the defendant from his talking to the commiſſioner and the witneſſes? He could not know, that it was improper. It is enough, that ſuch attempts at ſubornation, &c. may be made; though no evidence of that exiſts in this caſe. The caſes of wagers, &c. have no application to this.

(*a*) 2 *P. Will.* 182.

(*b*) *Cowp.* 37.

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Suppoſe, the arbitrators had proceeded under the bonds: could this parol agreement have been ſet up againſt the arbitration? The parties have appointed judges for themſelves, and have fixed the time for making their deciſion. Is there any inſtance, where the Court has ſaid, that, the arbitrators not having done it within the time, the Court will do it? The time is material. The Court cannot aſſume a juriſdiction, which the parties have given to others. The real agreement is, that it ſhall be referred to theſe perſons to make the diviſion between them. The only decree could be, that the arbitrators, though they have not proceeded to make their award within the time, ſhall now proceed. That would be a novel caſe.

With reſpect to the queſtion upon the ſtatute, there is nothing to authoriſe the Court to carry this agreement into execution. The reſervation of the plea to the hearing furniſhes a pretty ſtrong intimation of the opinion of the Court, that this admiſſion of a parol promiſe by the anſwer could not poſſibly avail againſt the ſtatute. The point certainly received a very ſhort diſcuſſion. It is ſaid, this is only a law of evidence: but the law is poſitive; that no action, which muſt include ſuits in equity, ſhall be brought. It has been lately decided in that very ſtrong caſe, *Roudeau* v. *Wyatt*, that no agreement, but one in writing, will do at law. It is ſaid, there is no danger of perjury. There is juſt as little danger upon an action at law as in equity: the agreement being once admitted upon oath here. It is enough to ſay, the point does not appear to have been decided; and your Lordſhip will not make a precedent liable to ſuch objections. But in two caſes in the Court of Exchequer in 1785, *Eyre* v. *Iveſon*, and *Stewart* v. *Careleſs*, cited (*a*) in *Whitchurch* v. *Bevis*, that Court was of opinion, that if the defendant inſiſted upon the ſtatute by his anſwer, though he confeſſed the agreement, a ſpecific performance could not be decreed. Obſerve, how this has grown to be law, as it is ſaid. The caſe of *Croyſton* v. *Banes* (*b*) makes it the indiſpenſible ground, that the ſtatute is not inſiſted on, though it is ſaid to be a public law, &c. Such are the confuſed ideas entertained upon this ſubject. *Symondſon* v. *Tweed* admits, that there never was a caſe upon the mere admiſſion of a parol agreement; they all amount to nothing but declarations of the effect of ſuch admiſſion: and they

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(*a*) 2 *Bro. C. C.* 563, 564.

(*b*) *Pre. Ch.* 208.

are general; never ſtating the circumſtances. Theſe two caſes ſhew, how extremely looſe the ideas of thoſe, who took the notes, were upon this ſubject. It is impoſſible to collect any clear, plain, ground, authoriſing the Court to diſpoſe of the ſtatute in that way. In *Whitchurch* v. *Bevis* and *Whitbread* v. *Brockhurſt* it is evident, the ſtrong inclination of Lord *Thurlow*'s opinion was, that there was no ground for thoſe *dicta*, that the mere admiſſion of a parol agreement without other circumſtances would authoriſe the Court to compel a performance. Since that period the queſtion ſeems to have been at reſt; and it appears to have been underſtood, that the mere admiſſion of a parol agreement, unleſs accompanied with part-performance, is of no more avail than at law. The caſes of part-performance go upon this plain ground; that, where the party acting under the agreement has been put to great expence, as by repairing, rebuilding, manuring, &c., improving the property of the other, the Court interpoſes upon the ground of groſs fraud: the ſtatute being made the engine of fraud.

The ſection relating to truſts does not depend upon the ſame ground as the 4th ſection. There is a remarkable difference of expreſſion. *Cottington* v. *Fletcher* was upon the ſame principle as the caſes of part-performance; that it was a groſs fraud in the truſtee, taking the eſtate for his own benefit. The caſes of reſulting truſts fall within the ſame rule. None of the caſes prove, that a parol contract will do, where it is admitted; and *Rondeau* v. *Wyatt* goes the whole length of deciding, that it ſhall have no effect in equity; for that caſe was equally clear of the danger of perjury. But all this argument is not neceſſary in this caſe; for at leaſt the agreement muſt be admitted in *totidem verbis*, and in the ſame manner as ſtated. Here the admiſſion is not of an agreement in the terms of that contained in the bill. The circumſtances, very ſhortly alluded to, as amounting to a part-performance, the arbitration bonds, the delay in returning the commiſſion, and the attendance of the arbitrators, have no ſort of ſimilitude to part-performance; of which there is not the leaſt pretence. The circumſtance, whether the commiſſion was or was not returned, is of no conſequence; and it ſeems ſingular to ſtate as an act the deſiſting from doing a thing. The agreement is to put an end to the ſuit. The commiſſion may be returned at any time. The agreement itſelf put an end to the ſuit. Then as to executing the bonds, that was no part of the agreement. Upon the pleadings theſe bonds are general bonds of reference. They contain nothing of the agreement. How do they help the proof of the agreement? How does the admiſſion, that the diviſion of this eſtate was the only object of the bonds, though general in their expreſſion, help the agreement? The admiſſion of that circumſtance is much weaker than the admiſſion of a parol agreement. Then as to the attendance of the arbitrators at the diſtance of a few miles, what effect has that: the ſuit, the eſtate, all remaining in the ſame condition? Going to view the eſtate has been held not to be an act for this purpoſe, even, if by the parties themſelves: *Clerk* v. *Wright* (*a*). *Mortimer* v. *Orchard* is a ſingular caſe; but has no relation to this. The ground of that was part-performance in the ſtrict ſenſe, by building; and the Lord Chancellor took it the moſt favourable way to the defendants, according to their admiſſion. This reſembles a plea of the ſtatute of limitations; which is pleaded thus; that no cauſe of action has accrued within ſix years (*b*). Though in this caſe there is a plea of the ſtatute, it might be pleaded in that way, that there was no agreement in writing.

Mr. Romilly in reply—With reſpect to the caſe put by your Lordſhip, where upon a parol agreement and a part performance ſtated this difficulty occurs; that if the defendant anſwers as to the part-performance, and ſays nothing about the agreement, and the part-performance is proved, and not the agreement, the Court can make no decree, your Lordſhip ſuggeſted, that there might be ſome future examination as to the agreement (*c*). In *Brownſword* v. *Edwards* (*d*), Lord *Hardwicke* ſays (*e*), in ſuch a caſe the Court does by an examination on interrogatories compel the party to anſwer to that fact, from which he protected himſelf at the argument of the plea. There is no difference in the agreement admitted: but, ſuppoſing it different, the plaintiff has a right to adopt it; and in the caſe your Lordſhip has mentioned it was an unneceſſary caution to amend the bill, and adopt the agreement admitted by the anſwer. It would have come under the general

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(*a*) 1 *Atk.* 12. (*b*) *Bayley* v. *Adams*, *poſt.*

(*c*) This, which fell from the Lord Chancellor during the argument, is noticed more at length in his Lordſhip's judgment.

(*d*) 2 *Veſ.* 243. (*e*) 2 *Veſ.* 247.

relief. In this inſtance the arrangement was only to facilitate the buſineſs. Suppoſe an agreement, ſtating, that poſſeſſion was to be given at Lady Day; and the defendant admits all; except, that he ſtates, that poſſeſſion was to be given at Midſummer: the Court has never proceeded with ſuch ſtrictneſs; but ſees, whether the plaintiff is entitled upon the whole bill. The bonds of arbitration were conſidered on the part of the plaintiff, not as an agreement, but as written evidence of an agreement; which takes the caſe out of the ſtatute. The agreement was to divide the eſtates. The bonds were a written acknowledgment, that there had been ſuch an agreement; a declaration, who were the perſons to divide. Certainly they are bonds to refer all matters in difference; requiring therefore ſome explanation: but the defendant admits, that the only matter in difference was the diviſion of the eſtate. I admit, that, the parties having choſen judges of their own, if this was the time, at which the arbitrators could make the diviſion, we could not apply: but their authority is at an end: the time being ſuffered to elapſe.

As to the part performance, the forbearance of the ſuit is ſubſtantially ſomething. It cannot ſeriouſly be contended, that it is nothing. There is no authority or principle, upon which the other circumſtances can be ſtated not to amount to a part performance. If the conduct of the parties is to be taken into conſideration, here is an innocent plaintiff, who has in no reſpect been guilty of miſconduct, deſiring a performance of the agreement againſt a perſon, who has greatly miſconducted himſelf by endeavouring to learn the opinion of the commiſſioners. As to its being done under the influence of the commiſſioners, there is nothing to affect the other commiſſioners except what *Still* ſays. The defendant's conduct, endeavouring to get at the evidence indirectly, is deciſive, that he knew he was acting improperly. If this conduct is permitted to prevail, it will open a door to bribery and fraud, inſtead of having the contrary effect.

Lord Chancellor—If it was neceſſary for me in the view I have taken of this caſe to decide many of the very important points, that have been diſcuſſed, and very ably diſcuſſed, at the bar, I ſhould not do my duty to the Court or the ſuitors by taking upon me to decide without much farther conſideration. But I

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own, it ſeems to me upon my view of the caſe, that the circumſtances, without calling for a deciſion of many of the points, that have been diſcuſſed, make it clearly my duty to diſmiſs this bill.

This bill is filed by a perſon, who, as I underſtand, in a cauſe, that produced the compromiſe, out of which the preſent ſuit originates, repreſented himſelf entitled to, and claimed, the whole of the premiſes in queſtion. He claimed them under a ſettlement, the exiſtence of which, as I underſtand the former cauſe, was denied by the defendant. The object of the former ſuit was to prove, as it could be proved, the exiſtence of that ſettlement; in order to maintain his title to the eſtate. The inſtrument might have been deſtroyed, or loſt, or kept out of his cuſtody by thoſe, who were under an obligation to produce it to him for the ſecurity of his title. The parties went to commiſſion; and it appears from the evidence in this cauſe, that evidence had been taken by the commiſſioners in the diſcharge of their duty, I do not ſay, merely as officers of the Court, but, as a part of this Court; for the execution of the commiſſion I take to be in fact the act of the Court, carried on by its miniſters. Without entering minutely into the whole conduct of the parties, it will be enough to ſay, in point of fact the parties came to an agreement to compromiſe the ſuit. Having come to that agreement, the firſt queſtion in this dry way of ſtating the caſe would be, whether the agreement actually entered into is ſuch an agreement in its terms, that, if effect is not given to it according to its terms, this Court can make a decree to ſubſtitute ſomething elſe in lieu of that agreement.

The execution of the commiſſion in a cauſe is the act of the Court, carried on by its miniſters.

The next queſtion is, Whether there are not circumſtances in evidence in this cauſe, leading to that agreement, which make it unfit for the Court to execute that agreement; not unfit on account of any conduct of the plaintiff, or any abſence of demerit in the defendant, but unfit in reſpect of conſiderations of general policy: or, in other words, whether the Court, acting upon ſuch principles, with due attention to conſiderations of public utility, can permit one individual ſuitor to ſeek relief, founding that relief upon the effect of a breach of thoſe rules the Court in its policy has adopted for the general protection of all ſuitors.

If both thoſe queſtions could be anſwered in favour of the plaintiff, there would be a third queſtion, involving the conſideration of the ſtatute of frauds; whether, attending to the ſtate of the record in this cauſe, by which I mean the bill, anſwer, and evidence, the caſe is according to the rules and principles acted upon in this Court a caſe, in which the defendant has not a right to inſiſt, the ſtatute has ſaid, no action, which duly interpreted embraces every ſuit in equity, ſhall be maintained againſt him under ſuch circumſtances.

As to the actual circumſtances, that led to the compromiſe, I ſtate them pretty correctly thus. Two commiſſioners, called in a proper ſenſe the plaintiff's commiſſioners, when that is underſtood to mean, that they are nominated by him, another commiſſioner, properly called the defendant's commiſſioner in the ſame ſenſe, met to execute part of the duty of this Court. They met under as ſolemn an obligation as an oath can impoſe, that, by whatever party named, they are at leaſt in this ſenſe to conſider themſelves as neither the plaintiff's nor the defendant's commiſſioners, that they are ſworn not to diſcloſe what paſſes before them; and it is not an unwholeſome or a ſtrained interpretation of that obligation to ſay, that he violates it equally, who diſcloſes the particulars of the evidence to either the plaintiff or the defendant, and he, who gives an intimation to either, that cannot but lead the mind to form a reaſonably ſound conjecture upon the general effect of that evidence, the particulars of which are not diſcloſed. I obſerve, and it was truly ſtated for the plaintiff, that the defendant, whether ignorant or not, that this was the ſtate of theſe commiſſioners as to their public duty, had certainly conceived an idea of a compromiſe, before any communication paſſed with the commiſſioners: but it is equally clear, that, whatever intention he had of a compromiſe, that intention was not ſo much matured as to induce him to propoſe a compromiſe, until it was ſtrengthened and confirmed by the circumſtances I am about to mention. Theſe three commiſſioners, if I am to believe Mr. *Still*, having gone through that part of their duty, that relates to the mere execution of the commiſſion, agree, that it is fit, that a communication ſhould be made to the defendant, in ſubſtance, that it would be for the intereſt of that defendant, that he ſhould compromiſe the ſuit. I am bound to ſay, theſe commiſſioners acted ill. They acted in violation of the duty they owe to the Court, and the juſtice due to the plaintiff. Either they did or did not diſcloſe the general effect of the evidence to the plaintiff. If they did not, they did him this groſs injuſtice: they concealed from him, that a caſe was made out entitling him probably to the relief prayed by the bill; and they communicated to the defendant, that it would be for his advantage to make a good compromiſe, if he could. If they communicated it to one only, they were guilty of manifeſt injuſtice to one; and if they communicated it to both, of which, I muſt obſerve, there is no evidence, they acted moſt unjuſtly to the Court. The defendant having received this intimation, that it would be for his intereſt to compromiſe the ſuit, notwithſtanding there had been floating in his mind a wiſh to compromiſe before any ſuch communication, and notwithſtanding that communication, which, though made in the dryeſt terms, yet coming from that quarter muſt be conſidered as a ſtrong hint to a party, even then was not inclined to come to a determination to compromiſe the ſuit; and according to the evidence of one witneſs a communication took place with the arbitrator *Still*; who was diſtinctly aſked, as to the meaning of the word "perſuade." Of his anſwer to that inquiry it may be ſaid, "*qui tacet clamat.*" What is the meaning of thoſe very few, but comprehenſive words, but, that independent of force he meant the ſtrongeſt perſuaſion, that could be offered to the defendant's mind?

In conſidering the agreement I ſhall take it from the prayer of the bill; and am anxious ſo to take it; for, whatever may be the caſe, where different agreements are ſtated in the bill and the anſwer, this caſe in its circumſtances ſhews, that if the Court is at liberty to indulge any inclination, that will be the moſt ſound conſtruction, which leaves the Court at liberty not to go one iota farther than the caſes; which have already gone ſo far as nearly to cancel the ſtatute. Upon the conduct of the witneſſes, as diſcloſed by this anſwer, I muſt obſerve, not for the ſake of animadverting upon the conduct of the witneſſes in this caſe, but to prevent ſimilar errors in other caſes, that it is not altogether without blame. They probably did not know the habit of the Court and the reaſon of that habit, that the effect of their depoſitions ſhould not be diſcloſed: but it is my duty to obſerve, that the Court does expect from witneſſes, that they ſhould not diſcloſe their evidence to parties.

Witneſſes ought not to diſcloſe their evidence to parties.

ties. Theſe gentlemen certainly do not by any means admit, and I take them as denying by their depoſitions, that circumſtance, that the agreement aroſe out of the communication with them. Between the credit due to their depoſitions and the anſwer I muſt interpoſe the credit due to *Still;* who ſays, it was in conſequence of the communication with them; and I muſt fairly ſay alſo, after reading their evidence with the greateſt attention I cannot diſcharge from my mind the full conviction, that they do know, the defendant made the agreement in conſequence of ſome communication by ſome perſon. It is fair to obſerve, that much may ariſe from the manner, in which in this Court the queſtions are put to the witneſſes: but it is impoſſible to doubt, that upon a *vivâ voce* examination the reſult of their evidence would be very different from what it now is.

The agreement according to the prayer of the bill is, that the plaintiff was to take the ſmaller farm, the defendant the larger farm; and that for equality of partition a portion was to be taken from the latter, ſo as to make the value equal. That agreement the defendant certainly does not admit; if it be part of the ſubſtance of the agreement, that the one farm ſhould be allotted to the plaintiff, the other to the defendant. If that is not part of the ſubſtance of the agreement, then the conſideration occurs, whether it may not be ſaid, the defendant has admitted the agreement. The bonds of arbitration upon the face of them are general, to ſettle all matters in difference. The ſubſequent part of the anſwer, it has been fairly and convincingly argued, provided, the rules of the Court will allow you to attend to it, reduces the matters in diſpute to that one mentioned in the ſubſequent part of the anſwer, to divide the eſtate equally. But it is to be remembered, that, when the ſubſequent part of the anſwer puts that interpretation upon the generality of the terms of the agreement, it attributes a duty to the arbitrators different from that, which the plaintiff ſays he expected from them; if there is any ſubſtantial difference between an agreement to give one farm to one, the other to the other, making up the difference in value out of the larger, and an agreement to divide the aggregate property, as they ſhould think proper. A propoſition being made for a compromiſe, it was of neceſſity a part of that compromiſe, whether the diviſion was preciſely in the terms of the agreement, as ſtated by the plaintiff, or generally, according to the agreement admitted, that the commiſſion ſhould not be returned; that all ſuch ſteps ſhould be taken as were neceſſary to enable them to make the award; that the eſtate ſhould be viewed, and ſurveyed, &c. Thoſe were neceſſary acts in the execution of the duty the arbitrators had taken upon them to diſcharge. This compromiſe was in the courſe of the cauſe; and I will now ſuppoſe, the bond had expreſſed upon the face of it, that nothing was in difference between them but an equal diviſion of the eſtate. Suppoſe, inſtead of taking place at the execution of the commiſſion, on the day the cauſe was to be heard the parties had agreed not to abide the judgment of the Court, but to make an equal diviſion of the eſtate, provided, that was made by the two perſons, in whoſe judgment they confided, and on or before a particular day, is that more or leſs than referring the cauſe upon particular terms to the award of individuals; and removing the cauſe out of Court for ever after that day, and in the interim, until that day; but leaving the cauſe in Court, as it was before, if the award is not made on that day? I am not aware of any caſe even at law, nor that a court of equity has ever entertained this juriſdiction, that, where a reference has been made to arbitration, and the judgment of the arbitrators is not given in the time and manner, according to the agreement, the Court have ſubſtituted themſelves for the arbitrators, and made the award. I am not aware, that has been done, even in a caſe, where the ſubſtantial thing to be done is agreed between the parties, but the time and manner, in which it is to be done, is that, which they have put upon others to execute.

Upon a reference to arbitration, if the award is not made in the time and manner ſtipulated, no caſe at law or in equity, that the Court has ſubſtituted itſelf for the arbitrators, and made the award; even where the ſubſtantial thing to be done is agreed between the parties: ſtill leſs, where any thing ſubſtantial is to be ſettled by the arbitrators.

But there is another circumſtance in this caſe; which appears to render it more difficult to do that in this particular inſtance than in the ordinary caſes; that here we are upon a parol agreement. What right has the Court to ſay, there is no ſubſtantial difference in an agreement compoſed of theſe different terms. The perſon ſuing alleging, that the whole eſtate belongs to him, a propoſal is made to him to divide the eſtate equally. He ſays, he has no objection: but he bargains, that a particular part of the eſtate ſhall be allotted to him. That agreement, he alleges, and proves by ſome of the witneſſes, is acceded to. Other witneſſes leave it as large as the anſwer ſtates it. The defendant ſays, that is not the agreement. He ſays, it was a general power to the arbitrators to divide; and he was to have his chance, what particular part of the eſtate was to be his. The queſtion, which was the real agreement, reſting in doubt upon the parol evidence, the reference upon the bonds being general, of all matters in difference, it would be very ſtrong to ſay, if the very terms are in diſpute between the parties, that the arbitrators have it not within their authority to ſay, what the agreement was as to its terms: If not, how are they to execute the authority delegated to them? If the plaintiff could make out, that it was part of his bargain, that he was to have the one farm, the Court has no authority to inquire, whether the ground of that is *pretium affectionis*, or not. It is part of his contract; and he would have a right to quarrel with the award, if it did not give him that part. If ſo, is it of no conſequence to parties in ſuch a ſituation, who are the individuals to ſettle the diſpute between them, and within what time it is to be ſettled? The *res geſtæ* point out, that it was of ſome importance to the defendant; for concealment of the diſgrace attaching upon the character of his relation was the very motive, that induced him to enter into the agreement. On the other hand, it was a circumſtance eſſential, that, as the award was only to be put an end to, if not made in due time, ſome time ſhould be mentioned. The arbitrators might die. They might refuſe to act. If the award was not made in due time, it does not appear to me, that there was any thing to preclude them from going on with the ſuit. Putting it ſimply upon this ground, it is very difficult to find any thing either of principle or authority, that an agreement to enjoy according to an award can be executed by the Court by compelling a diviſion of the eſtate, not according to the judgment of the perſons, in whoſe judgment the parties confided, and within the time ſtipulated, but according to the judgment of the Court with regard to the value of theſe eſtates.

Upon the evidence in this cauſe I am impreſſed, if not to conviction, nearly to conviction, that it is ſo dangerous to juſtice to execute this contract under all its circumſtances, that no individual has a right to aſk the relief, if it cannot be given but at the expence of general rules, formed for the protection of the general juſtice due to ſuitors; even if it is a caſe of conſiderable hardſhip to him. I lay out of the caſe the conduct of the plaintiff. It juſtifies this obſervation. He had proceeded with the

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ſuit, claiming the whole eſtate, to a particular period; as I muſt ſuppoſe, thinking, he had a reaſonable chance of ſucceſs. It is left totally unexplained, why he immediately acceded to the propoſal to give up half the eſtate. Upon that I cannot found any thing againſt him; for it was competent to the defendant to aſk him by a croſs bill, what he knew from the commiſſioners. The defendant not having done ſo, I ſhould act unjuſtly towards the plaintiff, if I conſidered his conduct as evidencing any thing but that upon the uncertainty of all ſuits he thought it more for his advantage to enjoy half the property than to go through a litigation for the whole of it. With reſpect to the defendant, without inquiring as to the propriety of his conduct, I muſt conſider it upon this fact; whether the defendant moved in the treaty he entered into, and acted in it, under a perſuaſion generated in his mind by the conduct of the commiſſioner, that it was for his intereſt, and therefore probably againſt the intereſt of the plaintiff, when he entered into this contract; in other words, whether the contract is generated out of a groſs breach of the duty of the commiſſioner. If it is, the next queſtion is, Whether the policy of juſtice will permit the plaintiff to come here; ſaying, the evidence ſatisfied the Court, that the defendant entered into the contract in conſequence of communications, which the policy of the law will not permit, which are a breach of the duty of the commiſſioner, and deſiring me to give him a pecuniary advantage ariſing from ſuch a contract. As to the fact, I have no doubt, the defendant entered into the contract under what I may ſtate as a ſpecies of dureſs, with a full conviction that theſe commiſſioners ſtating the diſtinction to him between perſuaſion and force meant to tell him, perſuaſion was force; and if he did not take the propoſition immediately, he would get nothing. How can it be conſiſtent with the ſecurity of the adminiſtration of juſtice, that the Court can act upon that, if it is the fact. There is no reaſon upon the evidence to ſay, that repreſentation is falſe. The Court in the nature of things have no evidence, that it is true; for it depends upon the ſubſtance of that evidence not yet diſcloſed to the Court. Suppoſing it falſe, how is it poſſible for the Court to grant a ſpecific performance of an agreement founded upon ſuch a tranſaction? Can I ſay, even if true, it can be founded upon ſuch a fact? But how is the Court to act, if it cannot know, whether it is true or falſe? Suppoſe, after I have diſmiſſed this bill, I ſhould hear the other cauſe to-morrow: it would not be a ſatisfactory reflection, that the day before the Court was in any hazard of giving relief founded upon a groſs breach of duty in the officer of the Court. If therefore it happens, that the plaintiff without any fault of his ſhould fail, he ſtands, as many other plaintiffs have ſtood, in a ſituation, in which the Court, though inclined to give relief to the individual, have upon general principles of policy been obliged to refuſe it. Upon theſe grounds therefore I am inclined to diſmiſs the bill.

Upon the other queſtion, if I am well founded in the reaſons I have aſſigned for diſmiſſing the bill, I ſhould feel gratified in declining to give a deciſive opinion. It is impoſſible for me to look without great apprehenſion upon the deciſion of any queſtion involving ſo much doubt in the minds of thoſe, to whoſe authority I am bound to look with reſpect and veneration. If I am to ſtate what rather ſeems to me the better reſult of all the caſes, I ſhould be diſpoſed to ſay, the ſtatute would ſtand in the way of the relief. I feel all the diſinclination, which has been lately expreſſed, and ſtrongly expreſſed, in many caſes to carry what may be called the ſtruggles of Courts of Juſtice to take caſes out of the reach of that *ſtatute* farther than they have been carried; and I am free to ſay, the very circumſtance, admitted in the argument, that there is no caſe, in which a defendant admitting a parol agreement, but inſiſting upon the benefit of the *ſtatute*, has been decreed to perform the agreement, would weigh much with me: ſo much, that I am not diſpoſed at this moment to think, that any judgment I could form upon the ſimple queſtion, upon which ſide the better reaſoning could be arranged, would ſhake me from the purpoſe, which I think a ſalutary one, of not forming a new head of caſes out of the *ſtatute*. At the ſame time I muſt ſay, and this ſubject I have thought of very anxiouſly, while I have practiſed in this Court, I have not been able to deliver my mind from the embarraſſment as to the caſes, which have been ſtated to be taken out of the ſtatute upon part-performance; if it be the doctrine of this Court, that the admiſſion of an agreement, though accompanied by a prayer of the benefit of the *ſtatute*, ſhall ouſt the defendant of the benefit of the *ſtatute*. The way, in which it has ſtruck my mind, is this. If the party has a right to relief in this Court, he has a right to an anſwer from the defendant to every

Lord *Eldon*'s opinion, that a ſpecific performance of a parol agreement cannot be decreed, though the agreement is admitted by the anſwer; if the defendant inſiſts upon the ſtatute of frauds: if he does not, he muſt be taken to renounce the benefit of it.

allegation of his bill, the admiſſion of the truth of which, or the proof of the truth of which, is neceſſary to entitle him to that relief. If his title to relief therefore ſtands both upon the fact of a parol agreement and part-performance of that parol agreement, there muſt in ſome ſtage of the cauſe be proof, that there was a parol agreement and a part-performance of that parol agreement; by which I mean ſome parol agreement certain and definite in its terms, and to which thoſe acts of part-performance can be clearly and certainly referred. If the defendant anſwers in the firſt inſtance, admitting the agreement, and ſaying nothing about the *ſtatute*, I ſuppoſe, if he ſays nothing about the circumſtances of part-performance, though not craving the benefit of the *ſtatute*, the plaintiff would not think it material to prove the circumſtances of part-performance, but would proceed upon that admiſſion; for upon this ſuppoſition the Court would decree it. Suppoſe, he prays the benefit of the *ſtatute*. He muſt go on to ſtate the acts of part-performance. Why? If it is the doctrine of this Court, that a parol agreement, notwithſtanding the defendant craves the benefit of the *ſtatute*, is to be executed, why does the Court do ſuch an unneceſſary thing as to make him anſwer as to the part-performance; for if there is no difference, whether he ſays any thing about the *ſtatute*, or not, why is not the plaintiff to have a decree in the former caſe as well as the latter? Therefore it would be a neceſſary conſequence in that caſe, that the Court ſhould not put the party to the expence of going on to anſwer as to the part-performance. On the other hand, ſuppoſe, he was to anſwer as to the part-performance, and not to the fact of the agreement; denying the acts of part-performance. Then the plaintiff goes on to proof with regard to all thoſe acts. It may happen, that they may be of ſuch a nature as to be themſelves pregnant evidence of ſome agreement, containing terms incapable of being miſunderſtood: but in 99 caſes out of 100 that cannot be expected upon the mere acts of part-performance. Nothing of them is known, till the depoſitions are publiſhed. The Court knows nothing of them till the hearing. Then the Court is to ſee, if there is any thing in the anſwer about a parol agreement, and ſo connected with the acts of part-performance as to make one whole; upon which the Court will decree. But as there is no admiſſion or denial of the agreement in the anſwer, the juſtice of the caſe requires, that there ſhould be ſome method of examining, whether there was a parol agreement, or not. I wiſh to know, whether there is any inſtance: has the Court ever adopted any means of ſatisfying itſelf as to that? Then the moſt rational way ſeems to me to be, that if the defendant admits the agreement, but inſiſts upon the benefit of the *ſtatute*, there is no occaſion to inquire about the part-performance; the *ſtatute* protects him: if he does not ſay any thing about the *ſtatute*, then he muſt be taken to renounce the benefit of it. This leads me to the concluſion, which appears in thoſe two caſes in the Court of Exchequer, and the inclination of Lord *Thurlow*'s opinion in *Whitchurch* v. *Bevis* and *Whitbread* v. *Brockhurſt*, and alſo more than an inclination of Lord *Loughborough* in *Rondeau* v. *Wyatt*; which I have reaſon to think would induce him with much greater experience to ſtate himſelf more ſtrongly in the ſame way upon this part of the caſe.

Diſtinction in the adminiſtration of law and equity in this country by different Courts; and conſequences of that diſtinction.

I take notice of the diſtinction noticed (*a*) in *Rondeau* v. *Wyatt* as to Courts of Equity, in order to make an obſervation upon *Brodie* v. *St. Paul*, the caſe, in which Mr. Juſtice *Buller* ſitting here ſaid (*b*), there is no difference whatſoever between Courts of Law and Equity as to the doctrine of part-performance. I have had occaſion, while ſitting in the Court of Common Pleas to think, the character of the Law of this country, dividing itſelf into diſtinct Courts of Law and Equity, has ſuffered more by the circumſtance of Courts of Law acting upon what they conceive to be the rules of equity than by any other circumſtance. If you addreſs yourſelf to the queſtion, how Courts of Law are to execute the equitable juriſdiction upon this queſtion, it is abſolutely impoſſible that they can exerciſe it. All the doctrine of this Court upon this ſubject attributes great weight to the oath of the defendant. It ſeems to have been forgotten in Courts of Law, that here the teſtimony of witneſſes is appreciated, not only by the intrinſic credit due to that teſtimony, but alſo by the conſideration, what the defendant, againſt whom it is produced, has ſaid by his anſwer. If the defendant denies, that any parol agreement ever took place, a Court of Equity will not inquire into the truth of that denial. Then can the doctrine of a Court of Law and a Court of Equity with regard to part-performance be the ſame? In every caſe, where the parties go to iſſue, a Court of Law muſt underſtand, that the defendant does deny it; and a ſingle witneſs would according to that

In equity the denial of a parol agreement within the ſtatute of frauds by the anſwer is concluſive.

(*a*) 2 *H. Black.* 68.

(*b*) *Ante*, vol. 1. 333.

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doctrine fix upon the defendant at law the whole effect of the equitable juriſdiction; whereas, if the plaintiff comes here, the moment the defendant in the form, in which iſſue is here joined, by his anſwer ſays, there was no agreement, the witneſs could not be heard: or, if he was heard, unleſs ſupported by ſpecial circumſtances, giving his teſtimony greater weight than the denial by the anſwer, the Court would not make the decree.

In equity againſt the anſwer there can be no decree upon the teſtimony of a ſingle witneſs, unleſs ſupported by ſpecial circumſtances.

I have taken the liberty of ſaying more upon this, becauſe I am ſeriouſly apprehenſive, that Courts of law, ſuppoſing, they are adminiſtering the rules of this Court, have totally miſunderſtood them. There is another claſs of caſes, with which you are all familiar; where a perſon treating for his daughter's marriage, aſks a queſtion as to the circumſtances of the intended huſband. A favourable account is given to him; as the plaintiff ſtates. There are other caſes; in which a man acts upon character given to him by one perſon of another (*a*). It has happened to me to try cauſes of this nature, while ſitting in the Court of Common Pleas; and the defendant poſitively denying, that any ſuch converſation ever paſſed, and a ſingle witneſs proving the effect of the converſation, large damages were given upon that teſtimony; and the argument in thoſe caſes has conſtantly been, that it muſt prevail; becauſe the rules of law and equity ought to be the ſame; when in thoſe very caſes without ſpecial circumſtances, making the ſingle teſtimony of the witneſs preponderate over the denial by the anſwer, in equity the plaintiff muſt have failed. What is this but ſaying, courts of law can adminiſter equity, where courts of equity would not dare to move?

Without entering into the queſtion upon the ſtatute, farther than to ſay, I am ſtrongly inclined to think, the ſafeſt conſtruction, and that, which if I were obliged to decide the queſtion, I muſt adopt, would be, that I muſt diſmiſs the bill, becauſe this caſe is within the ſtatute of frauds, adding only, that this caſe affords another ſtriking inſtance of the danger of departing from the ſtatute, becauſe the parties differ as to the ſpecies of the agreement; and the witneſſes differ as much as the parties do, I think, I can rely ſafely in diſmiſſing this bill upon the ground I ſtated in the outſet.

(*a*) See *Haycraft* v. *Creaſy*, 2 *Eaſt*. 92.

With reſpect to the coſts, if I diſmiſs the bill, I cannot give the plaintiff his coſts. Certainly I ſhall not give the defendant his coſts, though I do diſmiſs the bill; for, to ſay nothing more of his conduct, a party making ſuch an inquiry from commiſſioners, whether he knows or is ignorant, that it is improper to do ſo, falls either wilfully or inadvertently into a groſs impropriety of conduct. In conſequence of that impropriety he is implicated in this ſuit. No principle of juſtice therefore calls upon me to give him coſts. Taking the plaintiff to have acted without any impropriety, the conſideration, how he is to be reimburſed that expence, into which he has been, I will ſay, innocently led, remains with himſelf. Whether in the ſuit, in which he ſtands a party, in which the depoſitions have now been publiſhed, or in any other mode, he ſhall make an application to this Court, founded upon the conduct of the commiſſioners, that they ſhould pay the whole or any part of that expence, it is unfit to intimate, what the determination upon that queſtion ought to be: but upon my view of the conduct of the commiſſioners, I ſhould not do my duty, if I did not ſay, the queſtion, whether they ſhould not pay that expence, is a queſtion, that would be very properly addreſſed to the Court; for if the Court can find itſelf able to give the plaintiff, if not involved in the thing, the expence of his being involved in this ſuit, the Court would find ſatisfaction in doing it.

Upon a parol agreement for a compromiſe and a diviſion of the eſtate by arbitration acts done by the arbitrators towards the execution of their duty, as ſurveying, &c. cannot be conſidered acts of part-performance to ſuſtain the agreement.

With reſpect to theſe circumſtances as part-performance, I think, they do not fall within that character. They are nothing more or leſs than acts done by arbitrators towards the execution of the duty, which it was their buſineſs to compleat; from compleating which no repreſentations of the parties ſhould have reſtrained them. Theſe circumſtances have therefore no more weight than circumſtances of conduct of the arbitrators would have in any other caſe; where the abitrators do not finally proceed to execute the whole of the duty they have undertaken.

Bill diſmiſſed.

1801.

Rolls.

May 2.

SMITH *v.* CONEY.

Though the Christian name of the legatee was miſtaken in the will, the legacy was eſtabliſhed upon the deſcription and evidence; notwithſtanding great delay in filing the bill.

THE will of the teſtatrix contained the following clauſe: "I "give to the Reverend *Charles Smith* of *Stapleford Tawney* "in the county of *Eſſex*, clerk, the ſum of 500*l.*"

This bill was filed by the Reverend *Richard Smith*, claiming the legacy, upon evidence, that there was no perſon anſwering the deſcription of the legatee according to the will; and that the plaintiff was at the date of the will incumbent of *Stapleford Tawney*, and well known to the teſtatrix; who had a great regard for him.

The defendant, the executor and truſtee for infant reſiduary legatees, by his anſwer ſuggeſted, that the perſon intended was *Charles Smith*, an officer in the army; who lived at *Romford* in *Eſſex*; and died in the life of the teſtatrix; and therefore the legacy lapſed.

In oppoſition to the claim ſet up by the anſwer, it was proved by the widow of *Charles Smith*, that her huſband died, before the teſtatrix made her will; and that ſhe was informed of that circumſtance by the deponent, before the will was made. The bill was not filed until many years after the death of the teſtatrix, and ſix years after the death of a lady, who lived with her in great intimacy; and who, it was ſuggeſted, knew her intentions.

Mr. *Cooke* for the plaintiff.

The Maſter of the Rolls called on the Counſel for the defendant; obſerving, it was hardly poſſible to raiſe a doubt; and aſking, how Captain *Smith* could anſwer this deſcription.

Mr. *Romilly* for the defendant obſerved upon the delay in ſetting up this claim.

The Maſter of the Rolls—There muſt be ſome farther inquiry. But it will be very difficult to oppoſe this, and to ſuppoſe, the teſtatrix made ſuch a miſtake, with ſo particular deſcription and ſuch evidence. This ſort of queſtion is ſettled now. There are many inſtances of children going by wrong names. My only difficulty is, that the legacy was not called for during ſo long a time.

The defendant then gave up the point; and conſented to a decree for the legacy, with intereſt, and without coſts (a).

(a) *Parſons* v. *Parſons*, *ante*, vol. 1. 266. *Rylott* v. *Walter*, at the Rolls 17th *Feb.* 1802. *Garth* v. *Meyrick*, 1 *Bro. C. C.* 30. So evidence is admitted to explain initials or a blank, *Abbot* v. *Maſſie*, *ante*, vol. 3. 148. *Price* v. *Page*, *ante*, vol. 4. 680. See 3 *Woodd.* 328. *Baugh* v. *Read*, *ante*, vol. 1. 257.

GODFREY *v.* DAVIS.

Rolls.
May 2. 5.

An illegitimate child not entitled under the deſcription of a child in a will; though the teſtator knew the ſtate of the family, *viz.* ſeveral illegitimate and no legitimate children.

A bequeſt to a particular deſcription of perſons at a particular time veſts in perſons anſwering the deſcription at that time excluſively. Therefore an annuity being bequeathed over upon the death of the annuitant to the eldeſt child of *A.*, there being at the death no child, an after-born child is not entitled.

John Cree by his will required, that all his eſtates, real and perſonal, ſhould be converted into money after his deceaſe, and placed at intereſt upon ſolid land ſecurity (mortgage); and the iſſue and profits thereof annually to be diſpoſed of in manner following: *Imprimis*, To his daughter *Eleanor Cree* (afterwards *Eleanor Davis*) the annual ſum of 300*l.* during her life, to be paid half yearly; to *James Cree* 100*l.* *per annum*, for his life, payable half yearly; to *James M'Mahon* 200*l.* *per annum*, for his life, payable half yearly; and in caſe of his death his widow *Ann M'Mahon* to receive during her life 100*l.* *per annum*, half yearly. The teſtator then gave the following annuities, alſo payable half yearly; to Miſs *Elizabeth Francis* 300*l.* *per annum* for life; to *John Godfrey*, Eſq. 100*l.* *per annum* for life; to *John Byrn* 100*l.* *per annum* for life; with remainder to his daughter *Caroline Byrn* for life; to *Jane Harris* 60*l.* *per annum*; to *John Parſons* 40*l.* *per annum*; to revert to his daughter after his death; to *James Archdekin* 100*l.* *per annum*; and 100*l.* *per annum* to *David Godfrey*. The will then proceeded thus:

"And the firſt annuity of the great ones that drops in I will "and deſire may devolve upon the eldeſt child male or female for

“ life and in two half yearly payments of *William Harwood*; and in “ caſe the intereſt of my property produces a ſum more than ſuffi- “ cient to anſwer the payment of the ſeveral annuities herein ſpe- “ cified then the proportion of the annuities to increaſe; but if “ leſs to diminiſh in the like due proportion excepting the annui- “ ties of Miſs *Jane Harris* and my butler *John Parſons*. And I “ hereby will and require that as the ſaid annuities drop in their “ amount is to go to the increaſe of the annuities of the ſurvivors, “ ſo to increaſe to the laſt ſurvivor who ſhall hold the ſame during “ life: *Jane Harris* and *John Parſons* excepted. And when the “ ſaid annuitants are all dead the whole and ſole property devolve “ without any condition upon the heirs male of *Philip Francis* “ Eſq. of *St. James*'s ſquare, and in default of iſſue to female “ branch of the ſaid family of *Philip Francis* Eſq. taking the “ name and arms of *Cree*.”

The teſtator died in 1791 ſoon after the execution of the will. *David Godfrey* died upon the 15th of *May*, and *Eleanor Davis* upon the 24th of *June* 1798. The eldeſt daughter of *William Harwood* claimed the annuity of 300*l.* a-year; which claim was diſallowed on the ground, that ſhe was a natural daughter. An exception was taken on her part to the report. It was proved, that the teſtator was very intimate with *Harwood* and his family; and knew, he had no legitimate child; and that this daughter and all his other children were treated by him as his children (*a*). The parents of theſe children married ſeveral years after the teſtator's death. That exception was diſallowed.

Another claim was afterwards ſet up to the ſame annuity by *Clara Elizabeth Harwood*, as the only legitimate child; having been born after the marriage. Her claim being alſo diſallowed by the Maſter, ſhe took an exception to the report; which came on to be argued.

Another queſtion was made at the bar, but not determined: ſuppoſing her claim well founded, whether ſhe was entitled to the annuity of 300*l.* a-year or 100*l.* a-year.

(*a*) *Cartwright* v. *Vawdry*, *ante*, vol. 5. 530.

Mr. Romilly and Mr. Benyon in ſupport of the exception—The caſes of *Baldwin* v. *Karver* (*a*), *Heathe* v. *Heathe* (*b*), and others of that claſs, are diſtinguiſhed from this; as in thoſe there were two claſſes of children; and then there can be no doubt the intention is in favour of all thoſe children, who ſhall be alive at the time the contingency happens; for if the diſtribution is not confined to ſome particular period, it cannot be aſcertained, who are to take, until after the deaths of the parents of all the perſons to take; which leads to this inconvenience; that none of the perſons, for whom the fund is intended, may receive any benefit from it. But this is confined to one perſon. The teſtator knowing, the parent was unmarried, muſt have had in contemplation the birth of a child in future. He had in contemplation the ſurvivorſhip of theſe annuitants, until the laſt of them ſhould be dead. In that event only he gives it over. *Weld* v. *Bradbury* (*c*) is an authority in ſupport of this exception; though certainly different in its circumſtances. There are no words in this will requiring the object of this bequeſt to be alive at the death of the teſtator, or of the annuitant; who dropt. If ſhe had been alive at the death of the annuitant, ſhe would have been entitled within many modern caſes; the laſt of which is *Middleton* v. *Meſſenger* (*d*). This is not like thoſe caſes, where the diſtribution is to be among all the children *in eſſe* at the death of the tenant for life. This is not confined to the period of any life; but might laſt during ſeveral lives. In that reſpect it differs from *Congreve* v. *Congreve* (*e*).

Mr. Alexander and Mr. Cox for the ſurviving annuitants—The claim of the illegitimate child was rejected; becauſe no intention was ſufficiently expreſſed in her favour. Phraſes occur in this will, ſingularly denoting, that the teſtator intended the perſon to take to be alive at the death of the annuitant. Upon the whole will there can be no doubt, that if this child had not been born for 10 years, the exiſting annuitants would have enjoyed the annuities dropping in increaſe of their own annuities. It muſt be contended, in order to maintain this exception, that, even if the ultimate limitation had taken effect, the whole intereſt ſhould go back upon the birth of a child, after all theſe events were paſt. Upon the old caſes no one could take, who was not in exiſtence at

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(*a*) *Cowp.* 309. (*b*) 2 *Atk.* 121. See the caſes collected in Mr. *Sanders*'s note, 122. (*c*) 2 *Vern.* 705. (*d*) *Ante*, vol. 5. 136. (*e*) 3 *Bro. C. C.* 531.

at the date of the will (*a*). The conſtruction, that afterwards prevailed, was, that thoſe muſt be intended, who came into exiſtence before the death of the teſtator. Afterwards every one was let in, who anſwered the deſcription, before the fund became diſpoſeable in ſome way. In the ordinary caſe, a diſpoſition to the children at the age of 21, all, who are *in eſſe*, before the eldeſt attains 21, are let in (*b*): in the caſe of a tenant for life, all, who are *in eſſe* before the death of the tenant for life (*c*). That is the general rule; and in order to extend it a diſtinct intention to ſuſpend the veſting muſt be ſhewn. *Elliſon* v. *Airey* (*d*) has been recognized in almoſt every ſubſequent caſe. In ſubſtance there muſt be a legatee in being; unleſs an intention to the contrary is clearly ſhewn; in order to avoid ſuſpending. The direction for the devolution of the annuity implies, that there is a perſon in being, upon whom it is to devolve; and is not applicable to a ſuſpenſion for 15 or 20 years. The moſt explicit declaration is neceſſary to produce the effect of calling it back. The great difference upon this queſtion as to marriage ſettlements is, that all the children are the objects of thoſe proviſions. The caſe cited from *Vernon* is a looſe note upon very different circumſtances, and inconſiſtent with the ſubſequent authorities. With reſpect to the diſtinction from the other caſes, a diſpute between two different claſſes of perſons, that is the caſe upon this will; 1ſt, there is a particular claſs of perſons deſcribed: 2dly, there are the other annuitants. Upon what principle can *Elliſon* v. *Airey* and the other caſes be diſtinguiſhed from this? If all the children were intended, the conſtruction of the Court confining it was directly againſt the intention. The queſtion muſt reſt entirely upon the principle originally laid down in that caſe, and invariably acted upon ſince. It is ſaid, upon this conſtruction no perſon might take the benefit of this: but this is a caſe, in which there might or might not be a child of *Harwood* exiſting at the time the annuity falls in. Can the conſtruction be determined by the event? There certainly might be a perſon exiſting at the time; which clearly diſtinguiſhes it from

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(*a*) *Northey* v. *Strange*, 1 *P. Will.* 340.

(*b*) *Andrews* v. *Partington*, 3 *Bro. C. C.* 401. *Preſcott* v. *Long*, *ante*, vol. 2. 690. *Hoſte* v. *Pratt*, *ante*, vol. 3. 730.

(*c*) *Spencer* v. *Bullock*, *ante*, vol. 2 687.

(*d*) 1 *Veſ.* 111. In *Hill* v. *Chapman*, *ante*, vol. 1. 408. Lord *Thurlow* ſays, that caſe went upon a refinement; but cannot now be ſhaken.

thoſe caſes, in which of neceſſity there could be no perſon exiſting at the time. The expreſs diſpoſition of the annuity at the moment it falls in to the ſurviving annuitants negatives all idea of ſuſpenſion. But the general rule, admitted to be the reſult of the authorities, is ſufficient to overrule this exception.

Mr. Romilly in reply—This caſe does not fall within the general rule; and no caſe is produced in circumſtances like it. Taking the will and the facts as to the ſtate of the family together, well known to the teſtator, he muſt have had the intention maintained by this exception. He muſt have intended a legitimate child, according to the deciſion upon the former exception. He was aware of the probability, that one of the annuities might ſoon fall in: ſo many annuities being given, and not to young people. It is impoſſible upon the will not to ſee the intention. He muſt have had in contemplation a period, that might be diſtant, and ſome perſon, of whom he knew nothing; which diſtinguiſhes this caſe from *Congreve* v. *Congreve;* where, if not confined, it muſt have extended to a time, when all the objects of bounty might be dead. Such a limitation as this clearly means only, that there ſhall be a perſon ſtanding as the repreſentative of that family at ſome diſtant period; having no view to particular perſons. The argument would apply to every caſe of executory deviſe. In the famous caſe of *Hopkins* v. *Hopkins* (*a*) it might be ſaid, it was unnatural to ſuppoſe, the teſtator intended it to devolve to the heir at law, until ſome perſon ſhould come *in eſſe:* but no ſuch argument prevailed; and what ſtronger reaſon is there againſt the ſuſpenſion in this caſe? We do not argue from the event: but it appears clearly, the teſtator muſt have known, if one of the annuitants had died the day after the execution of the will, there was no one to anſwer the deſcription; and then there is nothing to ſhew he meant to confine it to the death of the annuitant, except the word "devolve:" but why is the devolution to be immediate in this inſtance more than in *Hopkins* v. *Hopkins*, or any other caſe? *Elliſon* v. *Airey* is relied on only for the general doctrine. The caſe in *Vernon* is the only caſe, that has any reſemblance in circumſtances; the diſpoſition being to the children of perſons, who had none at the time: whereas in the others the

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(*a*) 1 *Vern.* 268. *For.* 44. 1 *Atk.* 581. 1 *Veſ.* 268. Mr. *Butler's* note, 231. *Co. Lit.* 271. *b.*

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diſpute was between two claſſes of children: there being ſome at the date of the will. Who are the annuitants meant in the clauſe of ſurvivorſhip? Not the perſons named as ſuch only, but thoſe expreſsly named and the perſon deſcribed as the child of *Harwood;* and then there is no inconſiſtency in ſuppoſing, that a child born at any time might take the annuity. It is not material to contend, whether it was diſpoſed of in the mean time. I think not: but it would fall into the reſidue.

May 5.

The Maſter of the Rolls (*after ſtating the caſe*)—Upon the former exception by the eldeſt of the illegitimate children of *Harwood*, a daughter, who claimed as the perſon intended by the deſcription of "the eldeſt child," it was contended, that though by the determinations, that have taken place, no one can claim under the deſcription of a child, but ſuch as can claim as a legitimate child (*a*), yet upon the circumſtances appearing in evidence, the ſituation of *Harwood*'s family, not unknown to the teſtator, a family of illegitimate children, recogniſed by their father as his children, that daughter was entitled to the annuity falling in, as *perſona deſignata* in this will. Upon that exception I was of opinion, there was not ſufficient to entitle an illegitimate child to claim; for, whatever the real intention of the teſtator might be, and though it could hardly be ſuppoſed, he had not ſome children then exiſting in his contemplation, yet as the words are "the eldeſt child," ſuch perſons only could be intended, who could entitle themſelves as children by the ſtrict rule of law; and no illegitimate child can claim under ſuch a deſcription, unleſs particularly pointed out by the teſtator, and manifeſtly and incontrovertibly intended, though in point of law not ſtanding in that character. Notwithſtanding the evidence of the teſtator's knowledge of the ſituation of this family, I did not think, that entitled theſe children to claim under this deſcription. Therefore I overruled that exception.

Another claim is now brought forward by another daughter of *Harwood* by the ſame mother; who being born after the marriage of her parents has certainly a right to claim as the eldeſt child; provided, the teſtator did not intend upon this will a diſpoſition at

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(*a*) *Cartwright* v. *Vawdry*, *ante*, vol. 5. 530.

a given period. With reſpect to this the firſt conſideration is, whether upon this will enough appears to prove, the teſtator intended, that immediately upon his death theſe annuities ſhould take place: whether the whole produce of his property, though portioned out into annuities, was not manifeſtly intended to be divided among all theſe annuitants in different proportions, according to the degree of their annuities; and I am of opinion, that it is neither more nor leſs than a diviſion of the whole intereſt of his fortune, that might ariſe during the lives of any of the perſons there named, be it more or leſs, in proportion to their annuities, except the two given to *Harris* and *Parſons*, which I lay totally out of the caſe upon this queſtion; with the qualification, that if any die, there ſhould be a ſubſtitution in the room of the firſt dying. I am not under the neceſſity of ſaying, which are to be conſidered the great annuities. I conſider all as the great annuities for the purpoſe of entitling the child of *Harwood* to the firſt, that might fall in. In the view I have of this will it makes no difference, whether the right of ſurvivorſhip and of ſubſtitution in favour of the perſon deſcribed as the eldeſt child of *Harwood* attached upon the firſt or the ſecond of the annuities now vacant.

The next queſtion is, whether, as upon the death of the firſt annuitant there was no perſon anſwering that deſcription living, that annuity was to be divided among the ſurvivors, or to be ſuſpended, and the profits to accumulate, to ſee, whether any ſuch perſon ſhould come *in eſſe*. It is clearly eſtabliſhed by *De Viſme* v. *Mello* (*a*), and many other caſes, that, where the teſtator gives any legacy or benefit to any perſon, not as *perſona deſignata*, but under a qualification and deſcription at any particular time, the perſon anſwering that deſcription at that time, is the perſon to claim; and if there are any perſons anſwering the deſcription, they are not to wait to ſee, whether any other perſons ſhall come *in eſſe*: but it is to be divided among thoſe capable of taking, when by the tenor of the will he intended the property to veſt in poſſeſſion. That caſe was much conſidered by Lord *Thurlow*; and ſeems to have ſettled the law upon the ſubject. The firſt queſtion is, whether it is clear, the teſtator meant, any given ſet of perſons ſhould take at any given time: if ſo, it is clear, all perſons anſwering that deſcription, whether born before or afterwards,

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(*a*) 1 *Bro. C. C.* 537.

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ſhall take: but if there are no ſuch perſons, it ſhall not ſuſpend the right of others: but they ſhall take; as if no ſuch perſons were ſubſtituted. Before that caſe this point was not quite ſo clear: *Singleton* v. *Singleton* and *Ayton* v. *Ayton* (*a*). Where the gift is to all the children of *A.* at 21, if there is no eſtate for life, it will veſt in all the children coming into exiſtence, until one attains the age of 21. Then that one has a right to claim a ſhare; admitting into participation all the children then exiſting: ſo, if it is to a perſon for life, and after the death of that perſon then to the children of *A.*, the intention is marked; that until the death of the perſon entitled for life no intereſt veſts. When that perſon dies, the queſtion ariſes, whether there are then any perſons anſwering that deſcription: if ſo, they take, without waiting to ſee, whether any others will come *in eſſe*, anſwering the deſcription. If it is given over in the event, that there are no children, and there are no children at that period, the perſon, to whom it is given over, takes. It is clear, this teſtator meant theſe annuities to commence at his death; and that each annuitant ſhould receive a proportionable ſhare of his fortune, with benefit of ſurvivorſhip and right of accruer, ſubject upon the death of the firſt annuitant to the ſubſtitution of the eldeſt child of *Harwood*. Upon the death therefore of the firſt annuitant, unleſs there was ſome one, who had a right of ſubſtitution in the room of that perſon, and there was no ſuch perſon, it was to go among the ſurvivors. The perſon ſubſtituted, *viz.* the eldeſt child of *Harwood*, not having been then in exiſtence, cannot now claim. That conſtruction is much fortified by the manner, in which it is given over; for it is perfectly clear, he meant the perſons, to whom it is given over under the deſcription of the heirs of *Francis*, to take upon the death of the perſons, to whom it was firſt given over. If the conſtruction contended for is to prevail, thoſe perſons, ſuppoſing all the other annuitants, claiming by ſurvivorſhip, were dead, muſt wait not only the death of the ſurvivor, but alſo the death of *Harwood;* for during his life there would be a poſſibility, that a child might be born; who upon that conſtruction might ſay, he was the ſurvivor. That would be quite contrary to the words and what muſt be ſuppoſed the intention. Much ſtreſs was laid upon the event of the former exception; that not having in his contemplation the illegitimate children, or at leaſt not having deſcribed them ſufficiently, he

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(*a*) 1 *Bro.* 542. note.

might mean a child hereafter to be born. But that does not follow; that, becauſe by incorrect words he had not deſcribed his intention, ſo as to enable the Court to determine in favour of an illegitimate child, I am on that account to make a different determination on this point. It appears, he muſt have intended a perſon exiſting at the time any of theſe annuitants dropt; or to borrow an expreſſion from the caſe of *Thelluſſon* v. *Woodford* (a), of which we have heard ſo much lately, all the candles muſt be burning together. That muſt be the intention; and he could not mean, that there might be a perſon in embryo, to come out after the deaths of all the annuitants.

Upon theſe grounds and upon the conſtruction of the will being of opinion, that the intereſt in theſe annuities was intended to veſt in poſſeſſion, and unleſs there was ſome perſon to claim under the ſubſtitution, the whole intereſt would ſurvive to the others until the death of the laſt ſurvivor, and that there was no perſon to anſwer that deſcription at the time the event took place, I think, the Maſter was right in rejecting this claim; and the exception muſt be overruled.

I ſhall not decide the queſtion; which of theſe are to be conſidered the great annuities.

(a) *Ante*, vol. 4. 227.

ANONYMOUS.

May 6.

Injunction to reſtrain waſte not granted againſt defendant in poſſeſſion, claiming by an adverſe title.

Mr. *Thomson* for the plaintiff moved for an injunction to reſtrain the defendant from committing waſte. The defendant was in poſſeſſion: the tenants had attorned; and the plaintiff having brought an ejectment, had failed in it; but, as the bill alleged, not upon the merits.

Lord Chancellor—I do not recollect, that the Court has ever granted an injunction againſt waſte under any ſuch circumſtances: the defendant in poſſeſſion; the tenants having attorned: the plaintiff having failed in his ejectment: both ſetting up pretences

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tences of title. I remember perfectly being told from the Bench very early in my life, that if the plaintiff filed a bill for an account, and an injunction to reſtrain waſte, ſtating, that the defendant claimed by a title adverſe to his, he ſtated himſelf out of Court as to the injunction.

His Lordſhip having inquired, if the bar knew any inſtance, and none being produced, would not make the order (*a*).

(*a*) *Davis* v. *Lion*, *poſt*.

May 6. 8.

MUCKLESTON *v.* BROWN.

Bill by the heir at law againſt reſiduary deviſees, legatees, and executors; ſuggeſting a ſecret truſt, undertaken at the requeſt of the teſtator, either not legally declared, or, if ſo, void as to the real eſtate, and written acknowledgments by the defendants of an intended truſt for charitable purpoſes: the will alſo by equal legacies to them, and ſome particular expreſſions, importing a truſt. A general demurrer to the diſcovery and relief was overruled.

THE bill ſtated, that the plaintiffs were coheirs at law of *Iſaac Hawkins*; who being ſeiſed of the manor and eſtates of *Overſeal* in the county of *Lieceſter*, applied to the defendants *Iſaac Hawkins Brown*, and the Reverend *Thomas Giſborne*, and to the Reverend *John Hepworth*, to act as truſtees in the execution of certain truſts; upon which he had deviſed or bequeathed, or propoſed to deviſe or bequeath, all the reſt and reſidue of his real and perſonal eſtate not otherwiſe diſpoſed of; and that they or ſome or one of them having agreed to take upon themſelves, or himſelf the execution of the truſts, as *Hawkins* did then or ſhould duly declare, he made his will, dated the 9th of *Auguſt* 1793; reciting, that the plaintiffs were his coheirs; and ſpecifically deviſing certain eſtates to each of them and to another perſon reſpectively in fee; and giving ſeveral legacies; and as to all and every other his real eſtates whatſoever and whereſoever not before diſpoſed of and the reſidue of his perſonal eſtate, ſubject to the payment of his debts and legacies, he gave and deviſed the ſaid real and perſonal eſtates unto his good friend and relation *Iſaac Hawkins Brown*, Eſq. alſo to his kinſman the Reverend *Thomas Giſborne*, of &c. and *John Hepworth*, Rector of *Eggington* in the county of *Derby*, and their heirs; and he appointed them to be executors of that his will.

By a codicil, dated the 29th of *November* 1796, the teſtator reciting, that ſince the making his will he had purchaſed two ſmall farms, one at *Overſeal*, the other at *Hilton* in the county of *Derby*, gave and deviſed ſuch farm and all his lands and eſtates at *Hilton* aforeſaid to the Reverend *Thomas Giſborne* and his heirs for ever; and as to the farm at *Overſeal* he deviſed the ſame to *Giſborne* and *Brown* and to their heirs; "upon truſt for the like "uſes and purpoſes as my manor and eſtate at *Overſeal* now ſtated "limited." He then gave ſeveral legacies; concluding with legacies to *Brown* and *Giſborne* of 1,000 *l.* each; all which legacies or ſums of money he directed to be paid to the ſeveral legatees by the executors named in his will within twelve months after his deceaſe.

The bill farther ſtated, that *Hepworth* died in the life of the teſtator in 1795; and the teſtator died upon the 6th of *February* 1800; that the defendants entered upon and took poſſeſſion of the reſidue of the teſtator's real and perſonal eſtates; that the manor of *Overſeal* was not ſpecifically deviſed; but was included in and paſſed by the general deviſe of all the reſidue of his real eſtates; that no uſe or purpoſe was by the will or otherwiſe declared of the ſame; and it appears by the codicil, that the ſaid manor and eſtates at *Overſeal* ſhould be held by *Brown*, *Giſborne*, and *Hepworth*, upon certain truſts. The bill then ſtated applications to the defendants, and their pretences, that the plaintiffs are not entitled as coheirs to the reſidue of the real eſtates, the ſame being by the will and codicil deviſed to the defendants abſolutely; and charged, that it is manifeſt from the codicil, that the deviſe was to them as truſtees; and that the teſtator did not intend them to take any beneficial intereſt in the reſidue of his real and perſonal eſtates; and that they were ſo fully convinced, that ſuch was the purpoſe and intention, that they have repeatedly acknowledged the ſame; particularly *Giſborne* in a letter to *Brown*; which the bill ſtated; and which, as far as it was material, was in the following terms:

"It was as early as the ſpring of 1789, and probably earlier, "that the teſtator explained his intentions and wiſhes upon the "ſubject in queſtion to me. To the beſt of my recollection the "teſtator ſtated, that he propoſed to bequeath to his heirs at law "in certain proportions the eſtates he had inherited; and, after "providing for Miſs *Wilkinſon*, and, I preſume, for any ſpecific "legacies,

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“ legacies, to bequeath the whole reſiduum of his eſtates real and perſonal to his executors, not however for their private emoluments, but in full confidence, that conformably to his intentions they would have laid out the whole of it in charity or for charitable uſes: I think, thoſe were the preciſe terms; and am certain, they fully explain his meaning. He then mentioned the other executors; and propoſed to me to be a third; to which I aſſented; and aſſured him, I would faithfully perform according to his intentions my ſhare of the truſts (for ſo I conſidered it), if it ſhould ever devolve upon me. He ſaid, we muſt repay ourſelves out of the reſiduum all expences incurred in executing his intentions. I underſtood him alſo to mean, that we were not to have any ſpecific legacies. I have a faint recollection, that he ſaid, we might keep what we thought fit for our trouble: but I did not hear him ſay any thing, that would have authoriſed me, even ſuppoſing he had left me no ſpecific legacy, to retain for my own uſe, had I been ſo diſpoſed, any thing material; and I have no idea, I ſhould have thought it right to have taken any thing. I underſtood him to have had public charities, primarily at leaſt, in his own view; though I do not ſay, exclusively. Though I cannot abſolutely recollect his uſing the word “ private,” I am particularly ſure, that appropriating to private charity whatever we might find ourſelves legally excluded from aſſigning to public charities would fulfil the ſpirit of his intention. I expreſſed my wiſhes to him, that his will ſhould ſpecify, that the bequeſt was not intended for our private emolument, but for charity: but he intimated decidedly, that it would not be done without invalidating the bequeſt. Whether he diſtinctly named the mortmain (*a*) or other ſtatutes, as thoſe, which in that caſe would deſtroy the bequeſt, I cannot ſay poſitively. I aſked him to give me ſome information as to the particular kind of charity, to which he would have his executors appropriate part or the whole of his bequeſt: but he always replied, that we ſhould be the beſt judges, or to that import. I requeſted written directions. His anſwer did not excite in me any hope, that he would give any. He once ſaid, it would be very large; approaching 200,000*l.* Many years after the original diſcloſure of his intentions he expreſſed a wiſh, that a farm he had

(*a*) 9 *Geo.* 2. *c.* 36.

"purchaſed ſhould go to the benefit of the deſcendants of the family, from which he purchaſed; and ſaid, he muſt do ſomething for the poor of *Barton*; talking of ſettling 12 *l.* a year or ſome ſuch ſum. His converſation afterwards threw no farther light upon his intention."

The bill then ſet forth a ſtatement, drawn out by the defendant *Brown*, of his converſations with the teſtator, and his opinion of the intention; the material parts of which are, as follows:

"*February* 10. 1800. The firſt time I ſaw him after Mrs. *Hawkins*'s death he ſaid, he intended to leave the reſidue of his real and perſonal eſtate to me and *Giſborne*; giving reaſon to ſuppoſe, we ſhould have diſcretionary powers as to the application; unleſs we received particular directions; which I expected. I conſidered it to be his intention, that a conſiderable part was to be diſpoſed to charitable uſes, and another part, perhaps conſiderable, was to be given in private donations, not only to thoſe, who were objects of charity, but to perſons, who had claims upon his generoſity; one of whom he deſcribed; and all of whom I hoped he would have mentioned in ſome papers of his own writing; and that a third part I might legally reſerve to my own uſe; though it was never my intention to do ſo; becauſe he ſaid, I might keep what I pleaſed to myſelf. The impreſſion upon my mind was not altered by ſubſequent converſations, except in the following particulars. He told me, he had made another will; but had not made any alterations (except as to executors). He told me, he intended to leave me a ſpecific legacy; which I gueſſed to be 1,000 *l.* In one converſation I ſaid to him, the real eſtate might be affected by the mortmain act. He ſaid, it was impoſſible; becauſe I and *Giſborne* or the other executors (for I do not recollect, whether it was after the alteration in the truſts) would have the full and legal right to the whole reſidue; the diſtribution would be our own act and deed; or to that purport."

The bill farther ſtated, that the defendants pretend, the teſtator has by ſome writing or otherwiſe declared the truſts, upon which they and *Hepworth* were intended to take the reſidue of the real eſtate; and that they are willing to hold the ſaid eſtate to and for the objects of ſuch truſts; and charging, that the ſaid teſtator hath not legally or in any effective manner declared the ſaid truſts, and, that if he hath declared the ſame, they are as to the real eſtate of the teſtator, of which he was ſeiſed at the time of his death, null and void, prayed a diſcovery; and that the plaintiffs may be declared entitled as coheirs to the reſidue of the teſtator's real eſtates, an account of the reſidue of the real eſtates, and the rents and profits received by the defendants, and general relief.

The defendants put in a general demurrer to the diſcovery and relief.

The Solicitor General, Mr. Romilly, and Mr. Cox in ſupport of the demurrer—If this caſe ſtood upon the will alone, it would be without queſtion a deviſe of the whole beneficial as well as legal eſtate to the defendants: but upon the codicil it will be ſaid, a truſt is declared of the eſtates at *Overſeal*; or, if not declared, the intention of the teſtator, that they ſhould not be taken beneficially by the executors, is manifeſt. The truſt does not appear. It is not ſufficient for the plaintiff to ſhew, that there might be a diſpoſition for ſome perſon by ſome other inſtrument. It might be in truſt for the heir or a ſtranger: but that perſon coming for relief muſt ſhew, that he is entitled to it. It is not however to be admitted, that this is the interpretation of the codicil. Though awkwardly expreſſed, it may be referred to the payment of the debts and legacies; to which by the will the reſidue of the real and perſonal eſtates is ſubject. There is therefore a plain and obvious ſenſe to be attributed to theſe words in the codicil without referring to any other truſt. From the legacies given to the executors by the codicil, 1,000*l.* to each, it might be contended, that it is impoſſible they ſhould take the beneficial intereſt in the whole of this property: but in all they receive under the will they have a joint eſtate; and theſe legacies are diſtinct: the intention therefore is perfectly conſiſtent; to give them a joint intereſt in the general reſidue and a ſeparate intereſt in theſe legacies.

The next conſideration is as to the circumſtances ſtated by the bill. There is no ſuggeſtion of any fraud by the executors, intimating to the teſtator, that he need not declare the truſts in writing; but they would execute his objects. The whole moved from

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him of his own accord. In thoſe caſes alſo the bill is filed by the perſon, againſt whom the fraud is directed; *viz.* the legatee. Theſe plaintiffs endeavour to ſhew, a truſt was declared, not to give effect to it, but to diſappoint the intention. That circumſtance diſtinguiſhes this caſe from *Cottington* v. *Fletcher* (*a*); where the admiſſion of the truſt was required by the perſon claiming under it. With reſpect to the application of that caſe to this it is farther to be obſerved, that it turned upon the admiſſion; and Lord *Hardwicke* ſays, it might have been different, if the defendant had demurred. This bill repreſents, that no truſt was declared: but upon the will there is a truſt; *viz.* the payment of the debts and legacies. The effect of the papers ſtated in the bill is an admiſſion by the executors, that they do not conſider themſelves entitled as to the whole or part of the property to take it to their own uſe. But how is the Court entitled to look at thoſe papers, as evidence of a declaration of truſt either by the teſtator or by themſelves? Conſidered in the former light they can be only evidence of a parol declaration, ſuch as by the ſtatute of frauds (*b*) cannot have effect. Theſe letters cannot have more effect than they would have had, if written by the teſtator as directions for his executors to follow; and even in that caſe according to the ſtatute the Court could not have looked at them. This is an attempt to make uſe of a parol declaration of the teſtator, evidenced in this manner; which by the ſtatute cannot prevail. But conſider, what theſe papers are. One of the defendants ſays, he does not recollect, that the teſtator uſed the word "private:" but a diſpoſition to private charities would fulfil the ſpirit of his intention. Suppoſe, this had been incorporated in the will; and he had ſaid, his leading wiſh was to diſpoſe of the whole in public charities: but if that could not be, he gave them power to diſpoſe in private charities in any way they could: it would have been competent to him to give that direction, and to them to execute it; and the Court would not interfere.

All the queſtions, that can ariſe upon this ſtate of the caſe, were before the Court in *Adlington* v. *Cann* (*c*). How could the Court draw the line as to the proportion to be given to charity; as Lord *Hardwicke* ſtates the diſtinction there? Theſe defendants give very contrary accounts of the intention. Your Lordſhip will be

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(*a*) 2 *Atk.* 155. (*b*) 29 *Ch.* 2. *c.* 3. (*c*) 3 *Atk.* 141.

under the ſame difficulty, that Lord *Hardwicke* felt upon that occaſion; and the uncertainty here is much greater. If this is conſidered as a declaration of truſt by the defendants, that cannot avail the heir. They may diſpoſe of it in charity; and if they do it by an invalid inſtrument, that diſpoſition would be void; and the eſtate would remain in them; as if that inſtrument had not been executed. The ſtatute of mortmain does not apply to a deviſe to a truſtee; in whom the deviſor has a confidence, that he will diſpoſe of it; as the deviſor himſelf might have done in his life. That diſcretion may be exerciſed ſo that it will not interfere with the ſtatute.

As to the diſcovery, having prayed relief, to which they are not entitled, a general demurrer holds, according to the late caſes (*a*); though formerly otherwiſe.

Mr. Manſfield, Mr. Lloyd, and Mr. Fonblanque, for the plaintiffs—It is clear, an expreſs truſtee, if no truſt is declared, cannot take for his own benefit. The *Biſhop of Cloyne*, v. *Young* (*b*), and Lord *Guildford*'s caſe (*c*). Thoſe are caſes of perſonal eſtate: but the law is ſtronger as to real. So, if in any way it legally and ſufficiently appears, that the teſtator intended to give the eſtate for purpoſes forbidden by the mortmain act; or it fails for want of any requiſite. Has not the heir a right to a diſcovery, to make them admit or deny, that the eſtate was deviſed to them in truſt; and that they agreed to take it upon that truſt? Either no truſt was declared: or, if any, it is by parol. In either caſe the beneficial intereſt reſults to the heir; who does not require an intention in his favour. Are not the defendants to anſwer, whether the truſts are forbidden by the ſtatute of mortmain? If theſe papers are contradictory, yet they expreſsly ſhew, there were truſts: which is enough for the heir. It would be a groſs evaſion of the mortmain act to ſay, that though the truſtees admit, the eſtate is deviſed to them upon truſts prohibited by that act, yet it is not void; as there is no obligation upon them but that of honour; and they may diſpoſe of it in a manner not prohibited. That would be a gift, not by the truſtees, but by the teſtator; who had

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(*a*) See the references in the note (*b*), *ante*, vol. 3. 371. vol. 5. 189.

(*b*) 2 *Veſ.* 91.

(*c*) *Lord North and Guildford* v. *Purdon*, 2 *Veſ.* 495. *Niſbett* v. *Murray*, *ante*, vol. 5. 149. and the references in the note 158.

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by binding them in honour compelled them to comply with his intention. Whatever argument there might be at the hearing, if the deviſe is void at law, what reaſon is that for refuſing to anſwer? The conſtruction, that the words in the codicil "upon truſt for "the like uſes and purpoſes as my manor and eſtate at *Overſeal* "now ſtand limited," can refer to that part of the will, which ſubjects the real eſtate to the debts, is impoſſible. Why would not *Thynn* v. *Thynn* (*a*) and the other caſes of that claſs apply, where the bill is filed by the heir? If the truſt is not ſufficiently declared, why is not he to avail himſelf of it? Shall theſe defendants, having agreed to take the eſtate upon truſt, take it diſcharged of the truſt? In this ſenſe it is a fraud upon the heir: a ſecret truſt; which, if inſerted in the will, would be void; and the heir would take. *Cottington* v. *Fletcher* goes the whole length of deciding this cauſe for the plaintiffs; though Lord *Hardwicke* appears to rely on the admiſſion in the anſwer; for it is perfectly incomprehenſible, that, if the Court will decide upon the anſwer, they will not compel an anſwer. In *Adlington* v. *Cann* there was no charge, that the eſtate was given to them in truſt; and that they agreed to take it upon truſt; and it cannot be concluded, that the Court would not have compelled them to anſwer as to that. Neither is it there ſtated, that they had acknowledged, the eſtate was deviſed to them in truſt. The diſcovery, to which the plea was put in, was, whether by ſome parol declaration the teſtator had not ſaid, he gave them the eſtate in truſt. Lord *Hardwicke*'s argument is, that it is dangerous to ſay, the ſtatute of mortmain had overruled the ſtatute of frauds, and to admit parol evidence in ſuch caſes. In this caſe there is no ſuch queſtion. The whole goes upon the ground, that they accepted as truſtees; and have clearly expreſſed that by writing under their hands. As to the perſonal eſtate upon the codicil they are clearly truſtees by their legacies. If there is any thing in the bill, which, if admitted, the Court would execute, as a truſt or an agreement, it follows of courſe, they muſt anſwer; and *Cottington* v. *Fletcher* is in point to that. Lord *Hardwicke* determined *Adlington* v. *Cann* upon the uncertainty of the paper: the defendants denying, that there was any truſt, except what appeared upon that paper: but if the fact had been admitted, that the defendants were truſtees

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(*a*) 1 *Vern.* 296. Other caſes of that nature are collected in the note, *ante*, vol. 3. 38, 39. to *Pym* v. *Blackburn*.

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for charity, there would have been no occaſion for parol evidence. The ground, upon which the *Biſhop of Cloyne* v. *Young* proceeded, was, that it was clear, the executors were not to take beneficially; which was all, that was neceſſary. In *Loder* v. *Loder* there cited (*a*), even as to what was not exhauſted by the particular purpoſes of the truſt there was a reſulting truſt for the heir. The burthen is not upon him. The law gives it to him; if the truſtees cannot ſhew a diſpoſition of it for their benefit. In the *Attorney General* v. *Duppleſſis* (*b*) the words of Chief Baron *Parker* upon *Adlington* v. *Cann* are—"But Lord Chancellor "was of opinion, that they ſhould anſwer. And yet there would "have been a diſability and loſs of the eſtate by the mortmain "act 1736; if it had come out, that it had been formally deviſed "upon a truſt for charitable uſes (*c*)." That decides this caſe; for in 1740 they had pleaded: but Lord *Hardwicke* ſaid, they ſhould anſwer. They did anſwer; and produced that paper unatteſted; and ſaid, there was no other truſt. The reaſon, upon which they were compelled to anſwer, was, that there was no penalty, forfeiture, &c.: but the diſability to take aroſe from the policy of the law.

The caſe of *Biſhop* v. *Talbot* (*d*) cannot be diſtinguiſhed from *Adlington* v. *Cann*. *George Biſhop* by his will, after ſome legacies, reciting, that he was poſſeſſed of a certain eſtate as to four tenths, as to his own ſhare, he gave the ſame to *Thomas Talbot* and his nephew *Biſhop*, their heirs and aſſigns for ever in truſt; and he gave his perſonal eſtate to hold to the uſe of them, their executors, adminiſtrators, and aſſigns, for ever, upon condition to pay his debts, funeral expences, &c.; and the reſidue of his perſonal eſtate he gave to them. The bill was filed, ſtating a ſecret truſt. Exceptions were taken to the anſwer. By the ſecond anſwer the defendants ſtated, that they had a memorandum in writing; which they believed to be that of the teſtator, with no witneſſes; reciting the will, &c.; and declaring to them, the executors, the true intent and meaning, that he had given the real and perſonal eſtate in truſt for charitable purpoſes ſpecified; and they ſtated, that they believed, the premiſes were not deviſed upon any ſecret truſt for charitable uſes, or to be diſpoſed of otherwiſe than in the will. It

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(*a*) 2 *Veſ.* 96. (*b*) *Park.* 144. (*c*) *Park.* 160.

(*d*) MSS. at the Rolls 6th *February* 1772.

came before Sir *Thomas Sewell*; who ſaid, he did not think, the principal matter would be the validity of the paper writing: the queſtion was, what would be the effect of the anſwer; ſuppoſing, there was no paper: admitting, there was no truſt for charitable purpoſes, except what was mentioned in the anſwer, this is a ſort of diſclaimer upon their part; and the queſtion is, who ſhall have it? The accounts were decreed; and afterwards upon farther directions it was declared, that the deviſe of the real eſtate, ſubject to the debts and legacies, and the coſts, was to be conſidered as a reſulting truſt for the heir at law.

In *Byle* v. *Edwards* (*a*) a ſecret truſt for a charity was held void; and there was another caſe, *Martin* v. *Hutton* (*b*). In this caſe upon the diſtinct engagement alleged in the bill, to undertake ſuch truſt as the teſtator ſhould declare, the plaintiffs are entitled to diſcovery. The circumſtances in *Cottington* v. *Fletcher* did not call for what Lord *Hardwicke* is repreſented to have ſaid: it was ſo palpable, that the plaintiff could not entitle himſelf to the eſtate, that it was immaterial to give him the diſcovery. That caſe was in *March* 1740; and *Adlington* v. *Cann* in *July* in that year. The defendants did there rely on the plea only; and no notice is taken in *Atkyns* of what paſſed upon the diſcuſſion of the plea; but it is ſtated in *Barnardiſton* (*c*). That caſe is very different from this upon the previous engagement by theſe defendants, binding the conſcience, and the privity between them and the teſtator as to his purpoſe: but there the deviſe being perfect by the will was to be affected by ſomething dehors the will; to which the deviſees were ſtrangers; and reſting upon the production of a paper not executed according to the ſtatute of frauds.

As to the right to diſcovery, certainly in ſome late inſtances, where there has been a clear demand at law, and a bill has been filed for diſcovery, alſo praying relief, a general demurrer has been allowed: but the contrary practice formerly prevailed. In this caſe however the Court has a concurrent, and in ſome reſpects a peculiar, juriſdiction. There is no truſt whatſoever in writing;

(*a*) In Chancery before Lord *Northington*, 1769.

(*b*) In Chancery before Lord *Camden*, *Nov.* 1766.

(*c*) 3 *Barnard.* 130.

and it is doubtful, whether a Court of Law would ſuffer the anſwer admitting the truſt to be read: *Rondeau* v. *Wyatt* (*a*).

The Solicitor General in reply—Can the true conſtruction of the ſtatute be, that a declaration of truſt not according to the ſtatute ſhall be obtained by compulſion from the defendants? Sir *Thomas Sewell* in the caſe before him conſidered the anſwer as a diſclaimer: but if they had by a demurrer protected themſelves from anſwering, the juriſdiction of the Court would not apply. The reſult of *Adlington* v. *Cann* is, that all the material points ariſing in this caſe upon the ſtatute of frauds were before Lord *Hardwicke* in that; who decided, that he would not give the relief prayed. The plea was ordered to ſtand for an anſwer with liberty to except: then all the benefit of the plea was ſaved to the hearing.

With reſpect to the diſcovery, in *Collis* v. *Swayne* (*b*) the former practice was overturned; and that has been followed ever ſince.

Lord CHANCELLOR ſtating the caſe with great particularity delivered his opinion:

This bill is filed both for diſcovery and relief. It is far from my meaning to ſtate, that it does not involve many very important conſiderations: but upon the whole I ſhall do better by delivering the opinion I entertain at this moment, with the reaſons, upon which it is formed, and giving an immediate opportunity of rehearing the argument, in caſe that opinion ſhould be wrong, than by withholding the judgment, which at leaſt upon the ground of any argument my own mind at preſent ſuggeſts I do not hope to alter, delay the parties in the opportunity they have by a rehearing to offer better information to the Court than it can ſuggeſt to itſelf.

The interrogating part of a bill is to be conſtrued by the alleging part; and not to be conſidered more extenſive.

It is obſervable upon the interrogating part of the bill, that part does not in the terms of it connect itſelf with any truſt neceſſarily confined to a ſecret truſt for charitable purpoſes. I agree, if all the allegations of the bill are neceſſarily confined to ſuch truſt, the interrogating part muſt be conſtrued according to the alledging part;

(*a*) 2 *Hen. Black.* 63.

(*b*) 4 *Bro. C. C.* 480.

and is not to be conſidered more extenſive than the propoſitions, out of which thoſe interrogatories ariſe. But it will be ſeen, whether the allegations do not ſubſtantially embrace caſes of truſt far beyond the purpoſe to deviſe on one hand, and carry into execution on the other, a mere truſt for charitable uſes; for ſtating declarations of truſt effectual or ineffectual, the bill ſtates a caſe, in which the heir may be clearly entitled; for there is no doubt, if the truſt was ineffectually declared in its origin, or being effectual becomes ineffectual, the *Ceſtuy que truſts*, or a part of them having died in the life of the teſtator, independent of all queſtions as to the ſtatutes of fraud or mortmain, the truſtees would take upon truſts ineffectual in part or the whole. The bill prays a diſcovery; and that the plaintiffs may be declared entitled as coheirs at law to the reſidue of the real eſtate, and an account; and the general prayer, which frequently has been ſaid to involve every thing, might be taken as a prayer, that the title deeds might be delivered up: but in my view of the caſe, and admitting the rule, which I ſhould be very ſorry to find altered, ſince I left this Court, that where you pray both diſcovery and relief, if not entitled to the relief, you are not to the diſcovery, I do not examine, whether the general part of the prayer, underſtood as aſking a general diſcovery of deeds, *&c.* would or would not ſupport the bill, if the other part could not; for, independent of that, in my view of the caſe this demurrer cannot be maintained; and in caſes, which this bill might poſſibly bring forth, relief might be due, even if it ſhould turn out, that the defendants do not recollect, that any thing relative to charitable uſes was in the purpoſe of the teſtator. I have not any conception, that any anſwer they ever will put in will vary the caſe: but I muſt ſuppoſe, that it is poſſible, theſe defendants may upon their oath give a different account from that, which the bill alleges they have given. It is not immaterial, that the ſuggeſtion of the bill, that the teſtator applied to them to act as truſtees, is much fortified in *Giſborne*'s letter; for it admits, he had communication with the teſtator as early as 1789. The allegation is, that he applied to them to act as truſtees in the execution of certain truſts; upon which he had deviſed or bequeathed, or propoſed to deviſe or bequeath, the reſidue of his real and perſonal eſtate; and that they agreed to take upon them the execution of the truſts; as he did then or ſhould duly declare; which, I admit, means "effectually declare." But

If the plaintiff is not entitled to the relief, though he is entitled to diſcovery, a general demurrer is good.

ſtill, if it is neceſſary to put the caſe upon that ground, that they had agreed to accept the deviſe upon ſuch truſts as he ſhould duly declare, I am not quite prepared to ſay, it is clear, that, if he made the deviſe, meaning at the time thereafter duly to declare truſts, and it happened, that he did not declare any, that ſort of caſe would not be within the equity of this Court; and whether, if they admitted, his will was made upon an undertaking, that they would execute ſuch truſts, the heir would not have a right to ſay, no truſt was duly declared: the purpoſe therefore failed; and the truſt reſults by law to him, not upon the intention, but upon the ground, that there is no intention; and he is entitled to avail himſelf of that. Upon that ground therefore the bill muſt be anſwered.

Equal legacies to two executors make them truſtees of the reſidue undiſpoſed of; notwithſtanding inequality as to the real eſtate. So, though the legacies are given by a ſubſequent inſtrument.

Strong as the teſtator's purpoſe appears upon *Giſborne*'s letter, he did not feel himſelf quite equal to diſappointing his heirs; and therefore he ſpecifically deviſes ſome eſtates to them. If the caſe ſtood ſimply upon the will, the defendants are as to the perſonal eſtate truſtees, not merely by virtue of the office, but by expreſs bequeſt. The legacies of 1,000*l.* to each of them in the codicil being equal legacies, the inequality in the amount of the teſtator's bounty as to the real eſtate would not alter the inference, that they were to have only the office of executors; and the equality of the legacies would make them truſtees of the reſidue of the perſonal eſtate. I do not know a caſe, in which a legacy by a ſubſequent inſtrument has attached a truſt upon the reſidue under a prior inſtrument: but I do not know a caſe to the contrary; and a ſtrong inference ariſes, that they ſhould not have the whole, of which the legacies of 1,000*l.* were a part; and that is very material here; for it gives countenance to the firſt allegation in the bill; that, before the will was made, the teſtator applied to them to know, whether they would take the eſtates upon truſts, which he would or would not declare; and it raiſes upon juſt grounds and principles a ſuppoſition, that even between the dates of the will and codicil there might have been ſome uſes and truſts, either effectually or ineffectually declared, which attaching themſelves upon the gift of the reſidue of the perſonal eſtate by the will would explain, why the teſtator gave the legacies of 1,000*l.* by the codicil to them, to whom by the will he had given the whole reſidue of his perſonal eſtate. Though it muſt neceſſarily be admitted, that if there were nothing more than the will and codicil, I muſt put this conſtruction upon the latter, that all theſe words " uſes, truſts," *&c.* would be ſatisfied by that, which is really not, ſtrictly ſpeaking, a uſe or a truſt, but a mere charge upon the real eſtate; if it ſhould be neceſſary to have reſort to it in caſe of a deficiency of the perſonal eſtate, yet upon the will and the codicil, attending to the particular nature of the expreſſions, and connecting the particularity of the expreſſions and the inference to be thence deduced, with the allegation, that the defendants did undertake to take by a deviſe expreſſive of ſome uſes, intents and purpoſes, the Court is authoriſed to hold, that, though this might have been the conſtruction of the will and codicil alone, it may not be the conſtruction, the whole caſe being taken together.

In the allegation, that no uſe or purpoſe was by the will or otherwiſe declared, I conſtrue the expreſſion " uſe or purpoſe," as contradiſtinguiſhed from " truſt." Though in one ſenſe a truſt is a uſe or purpoſe, it is capable of being uſed in a diſtinct ſenſe; as I think it was by the perſon, who drew this bill. The latter part of that paſſage admits of two interpretations; that in fact the teſtator has not declared any uſe or purpoſe; or, that in law he has ineffectually declared; or, that the effectual declaration made has failed. The queſtion as to that muſt be anſwered by looking at the whole context. I do not think the defendants bound to anſwer the queſtion, whether it is not manifeſt by the will and codicil, that they are truſtees. That muſt be tried by the contents of the will and codicil. The letter of *Giſborne* diſcloſes communications between him and the teſtator from the ſpring of 1789 to the execution of the will and codicil; and *Giſborne* appears to have enjoyed a great deal of his confidence. It is moſt diſtinctly diſcloſed in that letter, that the teſtator projected an evaſion of the law. Whether he looked to private donation or public charity, whatever was the nature of the charity he meant to eſtabliſh, a diſtinct communication appears in this letter, that he dared not put his purpoſe in writing on account of the ſtatute of mortmain. That is a purpoſe, in aiding which I can go no farther than the law obliges me either on the part of him, who projects it, or of him, who promotes it by adopting the execution of it. On the other hand I can go no farther in

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deſtroying that purpoſe than the law furniſhes the means. But the policy of the law requires, that courts of juſtice ſhould diſtinctly ſtate, that it is incorrect conduct in both parties, both him, who projects ſuch a purpoſe, and him, who carries it into execution. Though there is great weight in the argument upon *Adlington* v. *Cann*, that if a truſt is declared, yet if it is ſo looſe and uncertain, how much is for charity, how much for private diſpoſition, that the Court cannot ſee ſpecifically, what is the ſubject, upon which the truſt is to attach, it is very difficult, I agree, to attach any truſt, I am not prepared to ſay, upon this letter alone the Court would be at much loſs; or would feel much difficulty upon the ſtatement of *Brown*. An intention is diſcloſed in that letter not altogether conſiſtent with the other: but it is not to be denied, that each of thoſe papers leaves a great deal to be diſpoſed of in charity, according to the declarations of the teſtator himſelf; and if the declaration of truſt reſerved to the defendants a power of diſpoſing to ſuch charities as they ſhould think proper, I am not quite ſure, the heir has not a right to call upon them to ſay, whether they have done ſo; or mean to do ſo; and how much they mean to diſpoſe of, and to give him the reſt. It is a fair ſubject of argument, whether *Giſborne*'s apprehenſion of the teſtator's meaning would bind the Court; or whether the Court would not ſay from the apprehenſion of the teſtator as to the ſtatute of mortmain, the purpoſe would apply to the whole of the property.

A very material part of the bill is, the allegation, that the defendants pretend, the teſtator has by ſome writing or otherwiſe declared the truſts, upon which they were intended to take the reſidue of the real eſtate; and that they are willing to hold upon ſuch truſts; and charging, that the teſtator has not legally or in any effective manner declared the truſts; and if he has declared them, they are as to the real eſtate, of which the teſtator was ſeiſed at the time of his death null and void. They might be void at his death, but good at the time they were created. Surely the heir has a right to know, whether the truſts were legally declared, and continued effectual to the teſtator's death. If bound to anſwer thoſe queſtions, they may ſay, there was a truſt, a writing; and that, if effectual, they muſt act according to it. The heir may ſay, the truſt was not well declared, or has become ineffectual

effectual in the whole or in part. In this view of the caſe beyond all queſtion the defendants muſt anſwer this bill; and if they muſt anſwer as to any of the allegations, it is very unneceſſary to ſay at preſent, whether they muſt anſwer as to the other part. I will not prejudice that part of the caſe farther than by ſaying, that upon an allegation of this kind, a truſt againſt the policy of the law, the Court does inſiſt, they ſhall anſwer it.

In *Adlington* v. *Cann* there was no truſt upon the face of the will: but a paper was written afterwards, which clearly demonſtrates, that the teſtator's intention was to devote the benefit to charitable purpoſes. If it reſted there, it is clear, a man cannot by an unexecuted inſtrument attach a truſt upon real eſtate. But they pleaded the ſtatute. That muſt have been allowed to be a good plea; unleſs the Lord Chancellor could have ſaid, though they plead the ſtatute, yet, if they anſwer, admitting the truſt, it would be fit to diſcuſs at the hearing, whether he would not give the heir the benefit of the reſulting truſt. Otherwiſe he would have allowed the plea at once; for they would except; becauſe there was no anſwer to the charge, that the defendants knew the ſecret truſt, &c. They muſt have anſwered thoſe exceptions, I think, upon the ſubſequent caſes. When the cauſe came on again, the plea, the benefit of which was ſaved to the hearing, was certainly beneficial; for it alleged, that, if there was nothing more in the caſe than a will expreſſing no truſt, and a paper, that could not be read, and no admiſſion of the truſt by the defendants, there was nothing in the cauſe applying to the conſcience of the defendants, or raiſing the argument upon the policy of the law, or in favour of the heir; that if the intention cannot be effectuated according to law, he ſhall take the eſtate upon the ground, that it is not effectually diſpoſed of. In a ſubſequent caſe (*a*) Sir *Thomas Parker*, who muſt have known *Adlington* v. *Cann*, took upon himſelf to examine it; and when it was very material to be accurate upon it; and he ſays (*b*) expreſsly, Lord *Hardwicke* compelled the defendants to anſwer. If ſo, we ſee in a ſubſequent caſe, how Sir *Thomas Sewell*, no mean authority, a judge very able and converſant in equity caſes, underſtood it; and this appears alſo to be the hiſtory of *Adlington* v. *Cann* by a note of Serjeant *Hill*. In the caſe before Sir *Thomas Sewell* the original

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(*a*) *The Attorney General* v. *Dupleſſis*, *Park.* 144.

(*b*) *Park.* 160.

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original anſwer ſimply ſtated the will. A farther anſwer was required; and by the farther anſwer the defendants ſtated, that there was a memorandum, not duly executed according to the ſtatute of frauds; and that memorandum did certainly point to a diſpoſition of the real eſtate to charitable purpoſes. Sir *Thomas Sewell* went a great length upon that, I confeſs. If he had ſaid, the law would authoriſe him to hold that a ſufficient denotation of an intention, that the deviſees ſhould be truſtees, the difficulty would be, how he came to read that memorandum. But he took it in another way; that, as they ſet forth the memorandum, they admitted the purpoſe of the teſtator, and put it, not upon the effect of the memorandum *vi ſuâ*, if I may ſo expreſs it, but as taken as their admiſſion. I doubt, whether that is quite correct reaſoning: but ſtill it furniſhes an authority; for Sir *Thomas Sewell* might be wrong in the fact, that that was an admiſſion: but his opinion is an authority in point of law, that, if there was an admiſſion, he would execute the truſt. Then it comes to this; that the doctrine of the Court is, that the defendant ſhall anſwer in ſuch a caſe; and if he anſwers in the affirmative, there is a reſulting truſt for the heir.

Cottington v. *Fletcher* does not affect this caſe. That caſe was upon the grant of an advowſon contrary to the policy of the law, by a Roman Catholic in truſt for himſelf. Afterwards he turns Proteſtant; and deſires a diſcovery as to his own act. The defendant put in a plea of the ſtatute of frauds; but by anſwer admitted the truſt. Lord *Hardwicke* is made to ſay, that upon the admiſſion he would act (*a*). I do not know, whether he did act upon it; but it is queſtionable, whether he ſhould; for there is a great difference between the caſe of an heir coming to be relieved againſt the act of his anceſtor in fraud of the law, and of a man coming upon his own act under ſuch circumſtances. It is there ſaid, it might be different, if it had come on upon demurrer. The reaſon given is, that as this aſſignment was done in fraud of the law, and merely in order to evade the ſtatutes, it was doubtful, whether at the hearing the plaintiff could be relieved. Lord *Hardwicke* means to ſay, that, if the defendant admits the truſt, though againſt the policy of the law, he would relieve; but if he does not admit the truſt, but demurs, he would

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(*a*) *Cooth* v. *Jackſon*, *ante*.

do, what does not apply in the leaſt to this caſe; the plaintiff ſtating, he had been guilty of a fraud upon the law, to evade, to diſappoint, the proviſion of the Legiſlature, to which he is bound to ſubmit, and coming to equity to be relieved againſt his own act, and the defence being diſhoneſt, between the two ſpecies of diſhoneſty the Court would not act; but would ſay, "Let the eſtate "lie, where it falls." That is not this caſe.

Then as to the principle: why ſhould it not be ſo? Surely the law will not permit ſecret agreements to evade what upon grounds of public policy is eſtabliſhed? Is the Court to feel for individuals, and to oblige perſons to diſcover in particular caſes, and not to feel for the whole of its own ſyſtem, and compel a diſcovery of frauds, that go to the roots of its whole ſyſtem? Suppoſe, the truſt was to pay 100*l.* out of the eſtate; and the deviſee undertakes to pay it, if it is not inſerted in the will: this Court would have compelled an anſwer, on the ground, that the teſtator would not have deviſed the eſtate to him, unleſs he had undertaken to pay that ſum (*a*). The principle is, that the ſtatute ſhall not be uſed to cover a fraud. If that is ſo between individuals and upon an individual claim, there is ſurely a ſtronger call upon the juſtice of the Court to ſay upon a private bargain between the teſtator and thoſe, who are to take apparently under his will, which is to defeat the whole of the proviſions and policy of the law, that they ſhall be called on to ſay, whether they took the eſtate, as they legally may not do, for charitable purpoſes. It is very difficult to ſay, that, if the juſtice due to individuals obliges them to diſcloſe in the one caſe, the juſtice due to the public ſhall not oblige them in the other. I am very glad to find upon the authorities, that they are to make the diſcloſure. It is difficult to ſay in ſound argument, that the principle of policy is not ſufficient: but I do not mean to decide upon this. The other grounds, that I firſt ſtated, are quite ſufficient. If I am bound to ſay, whether the bill ſtating the letters does or does not make a difference, I can find no authority, that the defendants ſhall not anſwer, whether they put the declaration of truſt in writing.

Upon the former of theſe grounds therefore I overrule this demurrer.

(*a*) See caſes of that kind referred to in the note, *ante*, vol. 3. 38, 39.

May 7.

WALKER *v.* FROBISHER.

Award ſet aſide: the arbitrator having received evidence after notice to the parties, that he would receive no more; in which they acquieſced.

Under a reference to ſettle the matter in difference, and award ſuch alterations in the defendant's works as to the arbitrator ſhould ſeem neceſſary, regard being had to their ſtate at a particular period, an award directing no other alteration than that parts of the machinery, which were made of wood, ſhould be made of caſt iron, was held a due execution of the authority.

THE object of the bill in this cauſe was to quiet the plaintiff in the poſſeſſion of his mill; after he had recovered damages in two actions againſt the defendant for uſing his mill in a manner, that impeded the uſe and enjoyment of that belonging to the plaintiff. When the cauſe came on before Lord *Roſslyn*, his Lordſhip with the conſent of the parties directed a reference to Mr. *Busfield* to ſettle the matter in difference between the parties, and award ſuch alterations to be made in the defendant's works as to him (Mr. *Busfield*) ſhould ſeem neceſſary; regard being had to their ſtate previous to *June* 1794.

The arbitrator by his award found, that the working of the plaintiff's mill had not been impeded to any material extent, if at all, by the alterations of the defendant's; regard being had to their ſtate previous to *June* 1794; and he directed, that the defendant's works ſhould be continued in the ſame ſtate, as they were; but that, as they were made of wood, and eaſily alterable, certain parts of the machinery ſhould be made of caſt iron. The award did not direct any other alteration.

A motion was made to ſet aſide this award upon the following facts diſcloſed by two affidavits:

At one of the meetings the arbitrator expreſſed his opinion, that the inlets to the defendant's mill were too deep; but not ſo much too deep as the plaintiff inſiſted they were; and that the truth lay between them. After ſeveral witneſſes had been examined on both ſides in the preſence of the parties or their attorneys, the arbitrator adviſed the parties to produce no more witneſſes; declaring his determination to examine no more witneſſes in the cauſe: but on the day, which he had ſettled for finally arranging his award, and on which he had directed the ſurveyors to attend, whom he was authoriſed to call in, and had called in, for the purpoſe of aſſiſting him, three perſons attended on the part of the defendant; and the arbitrator examined thoſe three perſons; and took minutes of what they ſaid; although no perſon attended on behalf of the plaintiff; and the arbitrator then made his award, as above ſtated.

The arbitrator by his affidavit ſtated, that he had examined all the witneſſes produced before him on either ſide at different meetings for that purpoſe; and having fully made up his mind on the ſubject on the 3d of *February* he appointed the ſurveyors to meet him on the 10th for the purpoſe of preparing the award: but, one being unable to attend, he had adjourned to a future day to make his award. On the 10th of *February* ſeveral perſons came into the room, where the deponent and the ſurveyors were, unattended by the ſolicitors on either ſide; and did mention ſome circumſtances relative to the matters in diſpute; of which the deponent believes he made ſome minutes: but they were at the ſame time told by him, that he had previouſly ſatisfied his mind on the ſubject; and he ſhould proceed to make his award.

The affidavit farther ſtated, that nothing, which paſſed, had the leaſt weight with him; and that the award contains his decided opinion before the 10th of *February* and ſince; and he denied to the beſt of his recollection having ſaid at any meeting, that the defendant's inlets were too deep, or having expreſſed any opinion whatſoever on the ſubject.

(*a*) Mr. *Sutton* and Mr. *Heald* in ſupport of the motion referred to *Morgan* v. *Mather* (*b*); as ſtating the grounds, on which awards might be ſet aſide; within which they inſiſted the facts diſcloſed by the affidavits brought this caſe. They contended farther, that the arbitrator had not purſued his authority; and the anſwer admitting, that the mills were not in the ſame ſtate, as they were previouſly to *June* 1794, was concluſive againſt the defendant; and the arbitrator was bound to award ſuch alteration as would bring them to that ſtate.

Mr. *Lloyd* and Mr. *King* in ſupport of the award urged, that the parties had produced all the evidence in their power on either ſide; and the affidavits do not inſinuate, that any new evidence was or could have been produced. They inſiſted, that

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(*a*) *Ex relatione.*

(*b*) *Ante*, vol. 2, 15.

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the award was conſonant to the order of reference, to award ſuch alterations as to the arbitrator ſhould ſeem neceſſary; and there was no neceſſity for him to award any alteration; if he did not think it requiſite.

Upon the laſt point they were ſtopped by the Lord Chancellor; who ſaid, in that reſpect the arbitrator had properly exerciſed his power.

Lord CHANCELLOR (*a*)—This award cannot be ſupported. The arbitrator, having been named by the late Lord Chancellor, is, I am well aſſured, a moſt reſpectable man: but he has been ſurpriſed into a conduct; which upon general principles muſt be fatal to the award. It does not appear to me, that he has by the award improperly exerciſed the authority given by the order of reference: but on account of the tranſaction, that took place on the 10th of *February*, the award cannot ſtand. He had examined different witneſſes at different times in the preſence of the parties. He recommended to them not to produce any more witneſſes. To that recommendation they accede; and in effect ſay, "Upon "the view of what is diſcloſed to you do what is right between "us." After this he hears theſe other perſons; and he admits, he took minutes of what was ſaid. It did not paſs as mere converſation. It does not appear, that he afterwards held any communication with the other party; or diſcloſed what paſſed to him: but the arbitrator ſwears, it had no effect upon his award. I believe him. He is a moſt reſpectable man. But I cannot from reſpect for any man do that, which I cannot reconcile to general principles. A judge muſt not take upon himſelf to ſay, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect juſtice: but upon general principles it cannot be ſupported (*b*).

(*a*) *Ex relatione.*

(*b*) See *Atkinſon* v. *Abraham*, 1 *Boſ.* & *Pul.* 175.

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April 22. 24.
May 11.

Account of meſne profits, ſince the title accrued, decreed againſt executors, upon the ſpecial ground, that the plaintiff was prevented from recovering in ejectment by a rule of the Court of Law and by an injunction, at the inſtance of the occupier; who ultimately failed both at law and in equity.

THIS cauſe aroſe in conſequence of the final deciſion of the cauſes of Lady *Cavan* v. *Pulteney*, and Lord *Darlington* v. *Pulteney* (*a*), concerning the validity of the leaſes granted by the late General *Pulteney* of ſeveral houſes in *Sackville* ſtreet, *Piccadilly*. The reſult of thoſe ſuits being againſt the leaſes, this bill was filed againſt the executors of the late Dr. *Warren*, one of the tenants, for an account of the meſne profits in reſpect of the houſe occupied by him from *July* 1791, when the poſſeſſion was required by the plaintiff, to *July* 1797.

The circumſtances and dates were theſe. Upon the 2d of *July* 1790 Dr. *Warren* and the other tenants received notices to quit. Upon the 5th of *July* 1791 a formal demand to quit was ſerved upon them. In *Trinity* Term 1791 an ejectment was brought in the Court of *King's Bench* by Sir *William Pulteney* againſt *Spottiſwood*, an undertenant of Lady *Cavan*, one of the leſſees; who by a rule of the Court was admitted to defend the action in the room of *Spottiſwood*. The demiſe in that ejectment was dated the 6th of *July*. Iſſue was joined upon a plea of the general iſſue; and at the trial after *Michaelmas* Term 1791 a ſpecial verdict was found; which was argued in *Eaſter* Term 1794; and a final judgment was obtained by the plaintiff upon the 24th of *May* 1794. Soon afterwards Lady *Cavan* ſued out a writ of error returnable in the Houſe of Lords. In *Eaſter* Term 1794 other ejectments were brought by Sir *William Pulteney* againſt Dr. *Warren* and all the other occupiers; who pleaded the general iſſue; and in *Trinity* Term following upon their application to the Court of *King's Bench* an order was made in each of thoſe actions, that the proceedings ſhould be ſtaid; the defendants undertaking to abide the event of the ſpecial verdict in the cauſe againſt Lady *Cavan*, and not to bring any writ of error for delay. Upon the 7th of *May* 1795 the judgment obtained againſt Lady *Cavan* was affirmed in the Houſe of Lords. The bill of Lady *Cavan*, Dr. *Warren*, and the other tenants, was then filed; and the bill of

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(*a*) Reported *ante*, vol. 2. 544. vol. 3. 384.

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Lord *Darlington*; and upon the 1ſt of *May* 1795 the order for the injunction was obtained in thoſe cauſes; with liberty to move to diſſolve it, in caſe the plaintiffs ſhould not ſet down their cauſes for hearing in *Michaelmas* Term enſuing. Under that order the injunction iſſued upon the 29th of *July*; and, the cauſes not being ſet down purſuant to the order, a motion to diſſolve the injunction was made in *Michaelmas* Term 1795. That motion was refuſed. Upon the 3d of *June* 1797 Lord *Darlington's* bill was diſmiſſed; and upon the 3d and 19th of *June* the order was made in the other cauſe, retaining the bill for 12 months; the plaintiffs to be at liberty to bring actions in conſequence of their eviction; and an inquiry was directed, how the aſſets of General *Pulteney* were diſpoſed of; and the injunction was diſſolved. Upon the 16th of *December* 1797 the minutes of that order were varied by inſerting a direction, that the plaintiffs ſhould not take out execution in thoſe actions till farther order. Upon the 17th of *June* 1797 Sir *William Pulteney* moved the Court of *King's Bench* for leave to enter up judgment againſt Dr. *Warren*; which was ordered in *Trinity* Term. Upon the 22d of *June* 1797 Dr. *Warren* died. Upon the 29th of *July* following poſſeſſion was delivered by his executors.

The bill repreſented, that the plaintiff was prevented by the order made by the Court of *King's Bench* for ſtaying the proceedings from entering up judgment againſt Dr. *Warren*; and that before the neceſſary application could be made to that Court for leave to enter up judgment, the bill was filed by the tenants; upon which the injunction was obtained.

The defendants by their anſwer inſiſted, that they ought not to account for the meſne profits demanded by the plaintiff; the ſame not being recoverable at law or in equity; and ſuggeſted, that the plaintiff ſtood by; and allowed Dr. *Warren* to lay out conſiderable ſums in improvements. They alſo filed a bill againſt Sir *William Pulteney*; praying a diſcovery as to that among other things; and whether Sir *William Pulteney* did not know previouſly, that the leaſe was void. The anſwer to that bill ſtated, that moſt of the expenſive alterations were made before the deciſion of the point; that the defendant never concealed, but avowed, his intention to break the leaſe, if he could; that he did not know, in 1794 or

1796,

1796, that Dr. *Warren* had laid out large ſums; and that the eſtate was managed by his agent.

A treaty had been entered into for aſcertaining the meſne profits, and making an allowance in reſpect of the improvements; but they could not agree.

Mr. Alexander, Mr. Romilly, and Mr. Dowdeſwell, for the plaintiff—This plaintiff ſtands in a ſituation very different from the abſtract caſe of a perſon ſeeking relief in reſpect of the meſne profits merely upon the death of the defendant. The application for equity raiſes a very different caſe. The queſtion however is ſo conſiderable to the juriſdiction of the Court, that it is proper to argue it as an abſtract queſtion; as if the circumſtance of the injunction did not occur. The great objection will be, that there is no authority for ſuch a demand. Certainly there is no particular caſe to be found: but it ſtands upon principle; and relief of the ſame nature is granted in caſes, where the claims of juſtice are not ſo ſtrong. The nature of this claim at law and of the obſtruction is to be firſt aſcertained. The difficulty ariſes from the axiom "*actio perſonalis moritur cum perſona.*" That is not univerſally, or even generally, true. It holds generally in the caſe of a tort: but trover and many other actions, though in the form of a tort, are really claims of property. There is a great diſtinction even at law as to the action not ſurviving againſt an executor in reſpect of the cauſe of action and in reſpect of the form of action. Inſtances of the former are actions of aſſault, battery, *&c.* But where the form of the action is a tort, but it is in ſubſtance a claim of property and a duty demanded from the aſſets of the teſtator, in reſpect of his having enjoyed a benefit, as in the action for meſne profits, the action would ſurvive; either an action for money had and received, or for uſe and occupation; according to the circumſtance of poſſeſſion either by the defendant himſelf or by a tenant. In *Hambly* v. *Trott* (*a*) Lord *Mansfield* fully diſcuſſes this diſtinction.

Next, what is the particular nature of the impediment at law? The caſe of *Birch* v. *Wright* (*b*) ſhews, that courts of law have ſaid, by perhaps too narrow a conſtruction, that having once

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(*a*) *Cowp.* 371.   (*b*) 1 *Term Rep. B. R.* 378.

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treated the defendant as a treſpaſſer, the plaintiff ſhall not bring an action for uſe and occupation. But in this caſe that ariſes from an accidental and collateral circumſtance, his obſtinacy in refuſing to deliver poſſeſſion, and putting the plaintiff to an action of treſpaſs. There can be no queſtion, the legal duty ſurvives on account of the benefit to the eſtate. Is it not alſo the invariable rule of this Court to act in aid of a legal duty, where the objection is only of form? Though no direct, preciſe, authority upon the abſtract queſtion can be produced, it is ſaid by the Solicitor General in *Dormar* v. *Forteſcue* (a), and not denied at the bar or by the Court, that there are many ſuch caſes. The only denial of it is in the argument of the late Attorney General (b) in *Curtis* v. *Curtis* (c): and upon principle and caſes bearing the cloſeſt analogy the queſtion muſt be determined with the plaintiff. In the *Biſhop of Wincheſter* v. *Knight* (d) the Lord Chancellor in granting the account of the ore and timber points evidently at the diſtinction; which is more developed by Lord *Manſfield* in the caſe in *Cowper*. The principle is preciſely the ſame upon the poſſeſſion of an eſtate and the profit ariſing from digging ore or cutting timber. There is no diſtinction between waſte and any other caſe. The action of waſte dies with the perſon, as the action of treſpaſs for meſne profits: but in both the duty is impoſed upon the aſſets in reſpect of the benefit received. It may be ſaid, the habit of the Court to grant accounts of this nature is founded on the difficulty of aſcertaining the quantum of damages. But what difference ariſes upon that? The Court acts only in aid of the legal remedy; and where that legal right againſt the executor does exiſt, the Court will act in ſupport of it; and will not ſuffer the right to be without a remedy. In *Taylor* v. *Crompton* (e) a difficulty was ſtated in recovering at law; and upon examining the record it appears, the bill was retained, with liberty to the plaintiff to proceed at law. In *Curtis v. Curtis* nothing turned upon the circumſtance, that the bill was retained; and the account of the meſne profits was decreed. Conſider the nature of the title to meſne profits in the action of dower; which is very analogous. At common law the widow was not entitled to meſne profits. That right was given by the ſtatute of Merton (f); and,

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(a) 3 *Atk.* 124. (b) Lord *Redeſdale*. (c) 2 *Bro. C. C.* 620.

(d) 1 *P. Will.* 406. See *Lord Hardwicke* v. *Vernon*, *ante*, vol. 4. 411.

(e) *Bunb.* 95. (f) 20 *Hen.* 3. *c.* 1.

Lord *Coke* obſerves (*a*), was only recoverable in one form of action, the writ of dower, *unde nihil habet.* Upon what principle then was the account decreed in *Curtis* v. *Curtis,* but that, wherever a debt is fixed upon the aſſets as to the meſne profits, this Court will enforce it, though the remedy ſhould be entirely gone at law? That is the firſt caſe, in which the remedy was given for the meſne profits: all the others being merely caſes as to ſetting out dower. The inference, that there is no ſuch limitation of the power of this Court as will be contended, appears even from the caſes, in which relief was refuſed: and the objection, that will be ſtated, is not to be found in thoſe caſes: but they are put upon other grounds, intelligible, analogous to the principle of law, and not affecting the principle, upon which this relief is ſought. It is clear, that even at law the title to meſne profits does not accrue before entry, or ſome act analogous, as that of bringing an ejectment; and in thoſe caſes the objection is, that for want of that there is no duty at law. In *Hutton* v. *Simpſon* (*b*) it was put upon that ground: but no idea was entertained of this objection. In *Norton* v. *Frecker* (*c*) alſo it was put upon the ſame point; and no ſuch objection was made, that the action for meſne profits cannot be maintained againſt an executor. Both claſſes of caſes therefore eſtabliſh the propoſition, that, wherever there is a legal duty, and a defect of remedy, the Court will give relief according to the circumſtances.

With reſpect to the right of tenants in common againſt each other as to the meſne profits the hiſtory of the law is ſingular. It appears, there is no remedy by the one againſt the other for meſne profits, unleſs the other was bailiff (*d*). *Littleton* (*e*) ſays, if the one occupy all, and put the other out of poſſeſſion and occupation, the latter ſhall have againſt the former a writ of *ejectione firmæ* of the moiety, &c. Lord *Coke* ſays upon that, the words "and put "the other out of poſſeſſion and occupation" are materially added; for though one take the whole profits, the other has no remedy by law againſt him; for the taking the whole profits is no ejectment. This miſchief was not remedied until the act for the amendment of the law (*f*) gave an action of account by one tenant in

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(*a*) *Co. Lit.* 32. *b.* (*b*) 2 *Vern.* 722. the 6th reſolution. (*c*) 1 *Atk.* 524.
(*d*) *Co. Lit.* 199. *b.* 200. *b.* (*e*) *Sec.* 322. (*f*) Stat. 4 *Ann*, *c.* 16. *ſ.* 27

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in common againſt the other. Before that period the habit of this Court was to grant relief upon the legal title in reſpect of the want of a legal remedy. *Drury* v. *Drury* (*a*). *Dean* v. *Wale* (*b*). The laſt caſe upon looking into the record appears to be preciſely like the other. A trial at law was ordered; in which there was a recovery by the plaintiff of one moiety. The Court was diſpoſed to direct an account: but no counſel appearing for the defendant, it was to be argued on his behalf on a ſubſequent day. There is no doubt upon that caſe, that this was the habit of the Court; though there was no legal remedy. In modern times the ſame point has been determined: *The Duke of Leeds* v. *Powell* (*c*); *The Duke of Leeds* v. *The Corporation of New Radnor* (*d*); and the ſame principle is laid down by Lord *Hardwicke* in *Benſon* v. *Baldwyn* (*e*). The whole juriſdiction of the Court is a comment upon, and eſtabliſhes, this principle; that wherever a legal duty is diſappointed by accident, this Court will ſupport it; and there is not a dictum to the contrary, except what is ſaid at the bar in *Curtis* v. *Curtis*.

Next, as to the particular circumſtances in this caſe; the dates ſhew, the plaintiff was prevented from recovering by the application of the defendants and the interpoſition of the Court in conſequence. *Dormer* v. *Forteſcue* and many other caſes aſcertain, that this Court will give this account, where it is not eſſential; as, where the plaintiff has occaſion to come to this Court for a diſcovery of a deed. All thoſe inſtances of ſuch relief upon the legal title are founded in convenience: this is upon the ſtronger ground of neceſſity. They come under a pretence of equity ſufficiently plauſible to induce the Court to aſſiſt them for a time; but which ultimately fails. The plaintiff, if not ſo prevented, might have executed his writ of poſſeſſion immediately; and then have commenced the action, 2 Ch. Caſ. 217. *Tilly* v. *Bridges* (*f*). It is admitted, that from *July* 179[illegible] to the death of Dr. *Warren*, he was wrongfully in poſſeſſion; that there is no legal remedy; that the plaintiff was prevented from availing himſelf of the legal remedy he once had by the interpoſition of this Court upon the unfounded claim of the defendants. The inſtitution of courts of

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(*a*) *Rep. Ch.* 26.
(*b*) *Rep. Ch.* 26.
(*c*) 1 *Veſ.* [illegible]1.
(*d*) 2 *Bro. C. C.* 338. 518.
(*e*) 1 *Atk.* 598.
(*f*) *Pre. Ch.* 252. 2 *Vern.* 519. 2 *Eq. Ca. Ab.* 588.

equity, as Lord *Mansfield* has expreſſed it, is to prevent ſubſtantial juſtice from being entangled in the net of form. Is the Court by a form, inſtituted by itſelf, to prevent a party having a legal remedy from availing himſelf of it? The injuſtice is manifeſt. Suppoſe an unqueſtionable legal right to a ſum of money; and from negligence or indolence nearly ſix years are ſuffered to elapſe; and then the creditor intimates, that he means to bring an action, and the other ſhould file a bill for an injunction; ſtating a great number of circumſtances, founded in fiction, and ſo entangled, that it is impoſſible to put in an anſwer in time; and afterwards it appears upon oath, that the Court was impoſed upon by the plaintiff: could the Court ſuffer itſelf to be made the inſtrument of iniquity? The caſe (a) in 2 *Chancery Caſes* is exactly a caſe of that kind.

Lord CHANCELLOR.—There is a caſe in *Shower*'s Parliamentary Caſes (b); where a decree for principal and intereſt beyond the penalty of the bond was affirmed upon the very ground, that the party was prevented from going on at law, while the demand was under the penalty.

For the plaintiff—That ſtrongly fortifies the argument. The plaintiff could not bring the action for meſne profits, until the judgment was affirmed in the Houſe of Lords: but if he could, it would not have been proper to do ſo.

Mr. Manſfield and Mr. Fonblanque for the defendants—The queſtion can only be upon the particular circumſtances, whether the bill brought by the leſſees gives Sir *William Pulteney* a right to ſue here for meſne profits; for as to any other equity the claim is againſt all principle, and the rules, that have long prevailed in this Court. If a legal demand has exiſted, which is gone by the death of the perſon, againſt whom it exiſted, this Court has never upon the ground of accident enforced that demand againſt the repreſentative. Death is not the ſort of accident, that gives ſuch a juriſdiction. In *Hambly* v. *Trott* it was determined, that trover does not lie againſt the executor, becauſe the plea is "not guilty." It was never imagined, that becauſe the action of trover is gone, this Court has a juriſdiction. With reſpect to the timber, no principle will ſupport the *Biſhop of*

(a) *Anonymous*, 2. *Ch. Ca.* 217.

(b) *Duvall* v. *Terrey*, *Show. P. C.* 15.

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Wincheſter v. *Knight*; though certainly this Court has entertained bills *inter vivos*: *Lee* v. *Alſton* (*a*); probably on account of the difficulty and inadequacy of the remedy at law; and that it was neceſſary to come for a diſcovery. The caſe in *Bunbury* is very obſcure. Thoſe caſes ſtand by themſelves. In the old books a bill for meſne profits is talked of in a very obſcure way; as if this Court had a concurrent juriſdiction with the law: but that has long ceaſed to be the law of this Court; which in later times has never aſſumed any juriſdiction as to meſne profits. In *Jeſus College* v. *Bloom* (*b*) it was held, that a bill does not lie for an account of waſte after the determination of the eſtate of the tenant. The true grounds for coming here for an account of meſne profits are ſtated by Lord *Hardwicke* in the judgment (*c*) upon *Dormer* v. *Forteſcue*. The reſult is, that, where the plaintiff is obliged on account of a truſt term ſtanding out, or fraud, miſrepreſentation, or concealment, to ſue here, and not at law, this Court will give the meſne profits; but never, where there is a remedy at law; and Lord *Hardwicke* expreſsly diſclaims the juriſdiction; and does not admit the latitude of the caſe in *Vernon* (*d*). There is no ſenſe in what is ſaid in *Hutton* v. *Simpſon* as to there being no entry. In the other caſe cited from the ſame book the circumſtances do not appear. The caſe of tenants in common has no relation to any ſuit like this. Certainly the old law in not permitting an account between them was extraordinary: but before the ſtatute there was no legal remedy; as there is in this caſe. The caſe as to rents proceeds upon this ground; that it was not known, what rent was due: The *Duke of Leeds* v. *The Corporation of New Radnor* (*e*); which is the common caſe; the rent being inconſiderable; and the landlord not knowing upon what part of the land to diſtrain; and therefore the legal remedy is gone. Thoſe caſes will not ſuſtain this juriſdiction, where there is a plain legal remedy. It is contrary to all experience, that the ſingle circumſtance, that a party has by death loſt his legal remedy, raiſes this juriſdiction, except upon mere perſonal injuries. It is admitted, there is no authority; but it is contended upon the principle. In *Curtis* v. *Curtis* all this doctrine was conſidered. The whole caſe proceeds upon the equitable right the widow had originally to come into this Court. In the *Duke of Bolton* v.

(*a*) 3 *Bro. C. C.* 37. *ante*, vol. 1. 78.
(*b*) 3 *Atk.* 262.
(*c*) 3 *Atk.* 129.
(*d*) *Anon.* 1 *Vern.* 105.
(*e*) 2 *Bro. C. C.* 338. 518.

Deane (a) there was the clear ground of concealment and miſrepreſentation.

The only real queſtion therefore is upon the circumſtances of this caſe; whether what paſſed in conſequence of the bills filed in this Court gives this juriſdiction: the plaintiff being by the injunction prevented from purſuing his legal remedy. That cannot be maintained. He was ſtopped by the Court of *King's Bench* till 1795. The moment the judgment was affirmed in the Houſe of Lords, if he had applied here, he might have had leave to obtain judgment in the Court of *King's Bench*. Inſtead of that he took no ſtep to enable himſelf to proceed in his ejectment. He ought to have applied to the Court; ſtating, that the party might die, and he might be prejudiced. Therefore he is himſelf guilty of laches; having reſted for two years longer. The anſwer to the caſes put of the Statute of Limitations is, that if a party is apprehenſive of being injured by any ſuch accident, the conſtant courſe of the Court is to order the party not to ſet up the Statute of Limitations, or, that five years have elapſed ſince a fine, *&c.*: but that is done upon an application in the ſuit, in which the injunction is granted, by the party in danger from the delay, for an order to prevent that advantage being gained by the other. If he does not make the application, that cannot be the ſubject of a new ſuit. To found the juriſdiction there muſt be an original equity drawing with it as a conſequence the account of meſne profits. It is an eſtabliſhed rule, that, where one party has obtained a legal advantage, he ſhall not be deprived of it, unleſs by an equity prior to that, which he can connect with his legal advantage. They muſt at leaſt make out a caſe of higher equity; for if the equities are equal, the Court will not interpoſe againſt the legal right. The material point is, whether the defendants can with a ſafe conſcience retain what is demanded. From the abſence of precedent the preſumption, that there is no ſuch principle, is not unfair. Many inſtances muſt have occurred, if ſuch a principle, that wherever the legal remedy is gone, the Court will take juriſdiction, exiſts. In all the caſes, the relief has been founded upon ſpecial circumſtances, excluding the notion of any general principle. In *Bouverie* v. *Prentice* (b) Lord *Thurlow* held, that this Court will not relieve in the caſe of a quit-rent, where the party has a remedy at law. The caſe of the dowreſs is really an anomalous caſe; and is ſo treated in *Mundy* v. *Mundy* (*a*), ſubſequent to *Curtis* v. *Curtis*.

(a) *Pre. Ch.* 516.

(b) 1 *Bro. C. C.* 200.

If the plaintiff had laid the demiſe more recently, he might have brought his action for uſe and occupation, inſtead of treſpaſs: but he has converted the occupier into a treſpaſſer in a Court of Law from the time his title accrued by laying the demiſe ſo far back; and now wiſhes to treat him as tenant in equity. Having the choice of treating him as tenant or treſpaſſer he choſe the latter. The impediment to proceeding at law is created by their own act. That cannot conſtitute a ground for coming here. A jury would have had to determine, not merely as to the rents and profits, but the quantum of damages. It would have been competent to the defendant to have ſhewn, that the plaintiff was benefited by an expenditure upon the premiſes far exceeding the rents and profits; and therefore, that it was a caſe for nominal damages. This bill does not take in that conſideration. It ſeeks dryly an account of rents and profits, without offering any allowance in reſpect of repairs and improvements; which would have been taken into conſideration at law; the giſt of the action being the extent of the damage. But whatever may be the rule at law, in this Court a caſe may ariſe ſo ſtrong, that the defendants would be entitled to an allowance even beyond ſubſtantial improvements; though in general the reference is confined to ſubſtantial improvements, to prevent it from being entangled.

However harſh it may appear, that a party ſhould ſuffer loſs by the act of the Court, it would be more inconvenient to lay down, that the Court is bound to repair the defect of every judicial act. The Court cannot do wrong to the party, according to the maxim "*actus legis nemini facit injuriam.*" Suppoſe, the order made by the Court was wrong; it does not follow, that the party, at whoſe inſtance it was made, is to forfeit any right, or repair the miſchief occaſioned by that erroneous order. In the caſe put of a creditor reſtrained, as it turns out, without any ground from ſuing within ſix years, in the event of the debtor's death before judgment would the Court in reſpect of the ſuſpenſion of the action by the injunction and the loſs occaſioned by that interference of the

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(*a*) *Ante*, vol. 2. 122.

Court, conſider the plaintiff as a judgment creditor, having a lien upon the real aſſets? There is no authority to ſupport that. The caſes coming neareſt to it are thoſe referred to by your Lordſhip; where by the effect of an injunction, reſtraining the obligee in a bond from proceeding at law, the amount of the principal and intereſt exceeds the penalty. *Duvall* v. *Terry* (*a*) perfectly eſtabliſhes that; which is alſo ſupported by *Godfrey* v. *Watſon* (*b*). The reaſon is, that the plaintiff reſtraining the legal right by the very terms of his bill offers to do right. In thoſe caſes he muſt have prayed an account, and of courſe muſt have offered to pay the balance. The terms of the bill therefore gave juriſdiction. *Audeley* v. *Ward* (*c*). Suppoſing the abſtract rule true, it will not apply to a caſe, where the interpoſition of the Court is made neceſſary by the act of the party. In *Taylor* v. *Compton* (*d*) the Court made no order: but in *Geaſt* v. *Barber* (*e*), a caſe exactly ſimilar to that, Lord *Kenyon*, though he retained the bill, ſaid, he would diſmiſs it rather than decree an account: the remedy being at law.

The principle, upon which this relief is ſought, is plauſible; but would be attended with infinite inconvenience. If it is a principle of univerſal juſtice, it muſt apply to every Court. Suppoſe a perſonal action brought at law; and from the preſſure of buſineſs at the Aſſizes it could not be tried; and ſtood with a *remanet* to the next Aſſizes; and in the interval the defendant dies: or ſuppoſe, the delay proceeded from the application of the party on account of the abſence of a material witneſs: though the act of the Court prevents the remedy from being available, the action cannot be ſuſtained againſt the executor; and the remedy is gone. In fact this plaintiff might have brought an action for meſne profits. It is clear, the action of ejectment, as now prevailing, originated in the time of King *Henry* 7. In *Reeves* (*f*) the hiſtory of this action is very full and accurate; and agrees with what is ſtated by Lord Chief Juſtice *Wilmot* in *Goodtitle* v. *Tombs* (*g*). Previouſly to the reign of *Hen.* 7. the meſne profits were uſually recovered before the recovery of actual poſſeſſion; and if the action for meſne profits is now the ſubſtitute for the "*Quare ejecit infra terminum*," it is to be conſidered entitled to the ſame effects, and is to have the ſame courſe of operation. But whatever doubt

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(*a*) *Show. P. C.* 15. (*b*) 3 *Atk.* 517. (*c*) *Hardr.* 136.

(*d*) *Bunb.* 95. (*e*) 2 *Bro. C. C.* 61.

(*f*) Hiſtory of the Common Law, vol. 4. 165. (*g*) 3 *Wilſ.* 118.

there may be upon that, it is ſettled, that treſpaſs for meſne profits may be brought pending a writ of error: *Donford* v. *Ellys* (a); and it follows, that it might be brought before the writ of poſſeſſion; which is ſuſpended by the writ of error. The difficulty is, that to ſupport treſpaſs for meſne profits there muſt have been actual entry (b); and it may be objected, that this plaintiff could not conſiſtently with that order have complied with that by entering. But by the uſual courſe of ejectments now the defendant by entering into the uſual rule is eſtopped from availing himſelf of that objection; and in *Bell* v. *Clarke* (c) a delivery of a declaration was held a ſufficient entry. Entry therefore is not of the eſſence of the action of treſpaſs for meſne profits. The only uſe now made of the judgment in ejectment, where the party brings treſpaſs for meſne profits, is, that the plaintiff is relieved from the neceſſity of ſhewing his title by producing that judgment, and aſking damages only in reſpect of poſſeſſion from the time of the demiſe. He may aſk the meſne profits from the time his title accrued, though the demiſe is laid within that time: but then his judgment will not avail him: but he muſt prove his title (d). The former practice has obtained from convenience: but the plaintiff is not eſtopped, if he chooſes to go for the profits anterior to the demiſe. It is not neceſſary therefore in an action for meſne profits to ſhew the judgment in the ejectment. The plaintiff may now, as he might before the time of King *Hen.* 7. treat the defendant as a treſpaſſer; recovering damages from time to time, without proceeding to recover the land itſelf.

Mr. Alexander in reply—The reaſon, that no authorities are to be found in ſupport of this equity, is that ſuch applications are not frequent. In all other caſes, where the claim of the plaintiff is a debt, the law does ſupply a remedy; as in the caſe of trover. It is peculiar to the combination of the two remedies, the action of ejectment, and the action for meſne profits, that this diſappointment of the plaintiff ariſes. In the caſe of a ſpecific chattel, where the *pretium affectionis* has influence, the plaintiff at law can only have damages: but this Court compels a delivery of the ſpecific chattel (e). So, before a Court of law exerciſed juriſdiction upon a loſt deed for want of *profert* (*a*), this Court interpoſed. There is no reaſon, founded in ſubſtantial juſtice, why a tenant ſhould for ſix years have the profits of the plaintiff's eſtate without accounting for them. The *Duke of Bolton* v. *Deane* (*b*) is a ſtrong authority for the plaintiff. It was a caſe, not of concealment or fraud, but of innocent miſtake. If ejectments had been brought againſt all the tenants, before it was abſolutely neceſſary, that would have been conſidered oppreſſion. The order reſtrained any farther proceedings againſt the tenants, generally, without any limitation as to proceeding to judgment. After the judgment was affirmed, nothing but the injunction prevented the plaintiff from proceeding againſt Dr. *Warren*; who lived about two years afterwards; and the injunction was got rid of only three days before his death. The opportunity of proceeding according to the ordinary form was therefore loſt by the interpoſition of this Court upon his application. This caſe is therefore very different from the caſe put of a *remanet* at the aſſizes, or the queſtion, whether, as a general propoſition, the Court will relieve againſt the conſequence of its own act: this injunction being obtained, and the diſſolution of it reſiſted, by the act of the party. The caſe in *Shower* goes upon the ſame principle. The anſwer to the argument from the rule not to go beyond the penalty always is, that the delay was occaſioned by the application of the party. The remedy in ſuch a caſe as this muſt be the ſame; though the party does not remain before the Court. Though the practice in bills for tithes is to waive the penalties, it has been lately held in the Court of Exchequer, that if the diſcovery has been obtained by a bill not containing that offer, and the plaintiff afterwards files another bill for an account of the tithes, and ſues for the penalties, he will be enjoined. The juſtice of the Court would be a mockery, if, becauſe he had diſmiſſed his bill, and was not before the Court, he could not be reſtrained from ſuch a proceeding.

(a) 12 *Mod.* 138.

(b) *Stanynought* v. *Coſins*, 2 *Barnes* 367. Ed. 3. 456.

(c) *Comb.* 453.

(d) *De Coſta*, v. *Atkyns*, *Bul. Ni. Pri.* 87. 2 *Bur.* 668.

(e) *Fells* v. *Read*, *ante*, vol. 3. 70.

The ſuppoſed poſſibility of proceeding in an action for meſne profits without obtaining judgment in ejectment, proceeds upon error. In every caſe, in which there is no actual entry, but only the ordinary proceeding in ejectment, it is neceſſary in the action for meſne profits not only to have the judgment but the

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(*a*) *Read* v. *Brookman*, 3 *Term Rep. B. R.* 151. See the note, 1 *Fonb. Treat. Eq.* 16. Ed. 2.

(*b*) *Bro. Ch.* 516.

writ of poſſeſſion. Even where the judgment is againſt the caſual ejector, the writ of poſſeſſion has been given in evidence: *Aſlin* v. *Parkin* (*a*). The principle is, that where there is no actual entry, as the injury is to the poſſeſſion, it is neceſſary in ſupport of that action to ſhew the poſſeſſion executed.

With reſpect to the repairs, which the defendants make a ſort of ſet-off, that point was at iſſue in the bill filed by the tenants; and it was in evidence, that Sir *William Pulteney* long before the formal notice to quit gave a general notice to all parties, that as ſoon as the exiſting leaſes ſhould be determined, he would proceed to ſet aſide the farther leaſes; and theſe repairs were made after that time. The defendants have produced no evidence in ſupport of their allegation; and there is a complete anſwer on the records of the Court.

May 11.

Lord CHANCELLOR ſtating the caſe, and obſerving, that the Court of *King's Bench* in making the rule for ſtaying the proceedings in the ſeveral actions of ejectment for ſome reaſon, not apparent, and perhaps, becauſe they might think, there was a queſtion fit to be agitated in equity, did not add as a term, that the defendants ſhould bring no ſuit in equity, and that it was clear, that, if there is any mode of recovery at law, it cannot be by an action of treſpaſs for meſne profits, delivered his judgment.

No action of treſpaſs for meſne profits againſt the executor,

The plaintiff inſiſts, that he has a remedy for theſe meſne profits in equity; more eſpecially, as he was by the act of the Court of *King's Bench* and the ſubſequent act of this Court upon the application of Dr. *Warren*, reſtrained from proceeding during his life; and that the plaintiff ought not to be injured by the conſequences of that act, preventing him from purſuing his legal remedy. In the argument at the bar it was conſidered, 1ſt, With regard to the claim, in caſe the plaintiff had not been reſtrained from proceeding by the acts of Dr. *Warren* in the Court of *King's Bench* and in this Court; and it was ſaid, that, though it is true, a perſonal action dies with the perſon as to the injury committed in the fact conſtituting the cauſe of that action, yet if the perſonal injury has been committed with a profit to the party doing that

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(*a*) 2 *Bur.* 665.

injury, there is both in law and equity a remedy ſufficient to extract out of his pocket that profit, which he has reaped by his injurious act, and, that this bill may be ſuſtained upon the general ground. It was argued, that this is a principle, which may be demonſtrated by the reaſoning in *Hambly* v. *Trott*, as far as the doctrine of law is to be looked to; and it is ſaid very truly, that all natural juſtice is with the plaintiff; who is now clearly to be taken to be entitled both in law and equity to the poſſeſſion from the moment he made the demand; and if ſo, the meſne profits are conſequential upon his obtaining poſſeſſion; and therefore it is at leaſt according to natural juſtice, that he ſhould now be placed in the ſame ſituation, as if there had not been an adverſe poſſeſſion at law againſt him and theſe adverſe proceedings in equity. It was further inſiſted, that merely from the circumſtance of his having brought actions of ejectment, which action is founded in treſpaſs, he cannot now maintain, upon *Hambly* v. *Trott* and other caſes, at leaſt for the meſne profits accrued ſince the ejectment, an action for uſe and occupation. With regard to that *Birch* v. *Wright* was cited. All, which that caſe decides, is, that in the ordinary caſe of a tenant, if you bring an ejectment, you cannot afterwards bring an action for uſe and occupation for the rent ſubſequent to the demiſe; becauſe having treated his holding as founded in treſpaſs you ſhall not treat it as founded in contract. That caſe eſtabliſhes this diſtinction; that that rule will not apply to the time previous to the ejectment. Therefore, if that doctrine is to be applied to this caſe, that authority does not preclude the plaintiff from trying, what he can make of the action for uſe and occupation for the time between 1791 and 1794; though it would preclude him from the time of bringing the ejectment down to the recovery under it. If I was ſatisfied, I ought not to interpoſe upon the ſpecial grounds in this caſe, I ſhould yield ſo far to the argument for the plaintiff as to that, that, finding it admitted, as it muſt be, that this is an application new, as far as it ſtands upon general principles, if it could be maintained, that an action for uſe and occupation would lie, that action being founded upon contract, it would follow, that they might be conſidered as indebted to him, and he might have a remedy againſt the aſſets. But I feel ſo much doubt upon that point, whether an action for uſe and occupation could be maintained, that I ſhould not think myſelf authoriſed to make the decree upon the ground, that could maintain that action, without firſt permitting an action to be brought upon the terms of not ſetting up the ejectment, the ſtatute of limitations, or any other legal bar, againſt that action; but that it ſhould be conſidered ſimply upon the plaintiff's title, as it ſtood in 1791, without embarraſſment from the ſubſequent proceedings. The difficulty I have in ſuppoſing, that action could be maintained, turns upon this; that theſe parties claim under a title neither adverſe, nor altogether otherwiſe. Taking it to be adverſe, as tenants claiming under a leaſe, which is contended to be effectual to bind the plaintiff, that leaſe determines the terms of their holding; and the recovery muſt be upon the foot of thoſe terms. If they do not hold under that leaſe, they are not in the ſame relation to the plaintiff as the tenant ſtood in *Birch* v. *Wright*; for he had the character of tenant: but if you ſay, the leaſe was not binding upon the plaintiff, you deſtroy the relation of landlord and tenant; and then there is an adverſe title; and it is difficult to ſay, they hold under that contract; which is the foundation of the action for uſe and occupation.

The ſimple caſe of the death of the occupier will not ſuſtain a bill for an account of the meſne profits under the head of accident.

If it cannot be put upon that ground, or if it is not thought prudent ſo to put it, the next queſtion is, if in no form of action, that can be deviſed, this queſtion can be tried at law, has the Court upon the general caſe, without adverting to the circumſtances of this caſe, a juriſdiction to ſay, theſe executors ſhall account for the meſne rents and profits? To put that queſtion correctly, I muſt for the preſent lay out of the caſe the fact, that Dr. *Warren* was with a variety of other perſons a defendant in a Court of Law, and a complainant with thoſe perſons in this Court; and I muſt look at him as being alone and individually a defendant in an ejectment; under which the plaintiff has not been able to obtain poſſeſſion, until it happened, that by the accident, as it is called, of his death the plaintiff cannot proceed in an action for meſne profits. I agree, it is impoſſible to conſider the mere circumſtance of his death as that ſpecies of accident, againſt which this Court would relieve. It is admitted, this caſe is new in its kind. It is contended however, that the demand upon the general principle can be ſupported by analogy to other caſes. Upon the beſt conſideration on that head they have not been able to ſtate any caſe, ſtrictly ſpeaking analogous. I feel very ſtrongly, that this claim is founded in natural and moral juſtice; and if it could be ſuſtained upon the general principle, the Court would be very ſtrongly inclined to ſupport it: but if it is to be determined upon the general principle, it muſt be deciſively put upon that ground, and not upon an analogy, which will not hold. With reſpect to the analogy, the bills by infants have gone upon the ground of infancy, and the character, in which the other party was conſidered to ſtand, as a bailiff or receiver. As to the caſe of the heir, without going through *Dormer* v. *Forteſcue*, and the other caſes, which were all diſcuſſed in *Pincke* v. *Thornycroft* (a), I do not know a caſe, in which the heir has claimed merely as heir an account, not ſtating any impediment to his recovering at law; that the defendant has the title deeds neceſſary to maintain his title; that terms are in the way of his recovery at law; or other legal impediments, which do, or which may probably, prevent it; upon which probability or upon the fact the Court founds its juriſdiction.

Upon ſuch a bill by an infant the ground is infancy and the character of the defendant, as bailiff or receiver.

No ſuch bill by an heir, merely as ſuch, unleſs ſome impediment at law; as poſſeſſion of the deeds by the defendant, terms, &c.

The caſe of the dowreſs is upon a principle, ſomewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her caſe upon the great difficulty of determining *a priori*, whether ſhe could recover at law, ignorant of all the circumſtances; and the perſon, againſt whom ſhe ſeeks relief, as was ſtrongly obſerved by the Maſter of the Rolls in *Curtis* v. *Curtis*, having in his poſſeſſion all the information neceſſary to enable her to eſtabliſh her rights. Therefore it is conſidered unconſcientious in him to expoſe her to all that difficulty, to which, if that information was fairly imparted, as conſcience and juſtice require, ſhe could not poſſibly be expoſed.

The caſe of the dowreſs has turned upon the difficulty ariſing from her want of information and the poſſeſſion of it by the defendant.

The caſe of mines is very different upon another ground. There the bill will originally lie againſt the party himſelf: if not, I do not know, that originally it could be brought againſt the perſonal repreſentative. The caſe of timber is alſo upon a very different principle. Lord *Hardwicke* ſays, the caſe of the mines is in the nature of a trade; and as to the timber, the equitable juriſdiction is put by him upon this; to prevent a multiplicity of ſuits; and the Court having juriſdiction with regard to the waſte takes the whole together: but he ſtates expreſsly, that if there is not a ground for an injunction to reſtrain waſte, the party muſt go to law (b).

Ground of the caſe of mines; which is in nature of a trade: as to timber, the account depends upon the juriſdiction for an injunction.

(a) 1 *Bro. C. C.* 289.

(b) *Jeſus Coll.* v. *Bloom*, 3 *Atk.* 262.

The caſe of tithes turns upon the property in the tithes.

The caſe of tithes is alſo very different. When ſevered they belong to the tithe-owner. It is an acquiſition of property, as ſtated in *Hambly* v. *Trott*, put into the poſſeſſion of a party; who ought to give it to another.

There muſt be either a difficulty to recover at law, or fraud, concealment, *&c.*

Upon the *Biſhop of Wincheſter* v. *Knight* therefore and all theſe caſes, there muſt be either a difficulty to recover at law, or fraud, concealment, *&c.* which enables the party to ſay otherwiſe than that if he had gone to law he would have recovered. There is therefore no analogy ariſing from theſe caſes. If I was obliged to decide, whether this claim could be ſupported upon the general principle, I ſhould wiſh to hear the caſe further argued, before I ſhould venture to introduce a new deciſion upon this ſubject. But I am relieved from that by the ſpecial circumſtances of this caſe; which make it unneceſſary to decide upon the general principle. The plaintiff muſt now be taken in this Court to have had a clear legal right to the poſſeſſion as early as 1791. In that year he brings an ejectment againſt one occupier. The bill does not inform me, why he abſtained from bringing ejectments againſt the others till 1794. In that year he brought ejectments againſt all the tenants; and then they in a maſs feel the juſtice of his acting againſt one only; and they make an application, a very proper application, to the Court of *King's Bench* to reſtrain him from proceeding againſt them, upon this ground, diſtinctly ſtated, that they hold by the ſame title as Lady *Cavan*; and that it was equitable, that action ſhould decide the queſtion between the plaintiff and all of them; praying, that the plaintiff ſhould not be at liberty to proceed one ſtep farther againſt them; undertaking, that the recovery againſt Lady *Cavan* ſhould bind them, as far as the law was to deal between them; aſſerting therefore, that the plaintiff acted with great propriety in forbearing to bring actions againſt them till 1794. In law therefore they identify their caſe with Lady *Cavan*'s. It was not adverted to in the Court of *King's Bench*, that there was a manifeſt call of juſtice upon them to have done more; and I am entitled to ſay ſo upon their ordinary practice; taking care, that inquiries ſhall not prejudice the ultimate rights of parties by the effect of their rules, operating as injunctions. If a verdict had been obtained in an action for damages, which that Court might think exceſſive, they would hardly grant a new trial without taking care, that the plaintiff in the interim ſhould not loſe all benefit of the verdict by the

Upon a motion for a new trial for exceſſive damages the Court of law would take care, that the right of the plaintiff ſhould not be prejudiced by the death of the defendant.

the death of the defendant. I allude now to the rule with great propriety adopted in the caſe of Lord *Dorcheſter* (*a*) and a gentleman in the weſt of *England*. It would have been perfectly juſt in this caſe to have ſaid, the defendants ſhould put the plaintiff in the ſituation, in which he would have been, if they had not interpoſed. That however was not added. I do not ſtay to examine, whether it was neceſſary, that the judgment in the ejectment ſhould precede the action for meſne profits: but if it was neceſſary, the plaintiff could not avail himſelf of the judgment, affirmed in 1795, on account of the bill filed in this Court; inſiſting, that notwithſtanding the recovery at law ſtill it was againſt conſcience, that the plaintiff ſhould have the poſſeſſion on account of the circumſtances, making it equitable, that he ſhould not avail himſelf of his legal rights. Upon that ground the injunction was obtained. If that injunction was not capable of being maintained at the hearing, and it was not ſuggeſted to the Court to provide againſt accident as to the meſne profits, I cannot agree, that it is the plaintiff's fault; becauſe he does not aſk enough. It is the duty of the Counſel to inform the Court; and if they do not, and the Court happens not to have acted upon its information up to the point, which it ought to have reached, it is bound to relieve the party, as far as it can, from the injuſtice, to which the ſhortneſs of its proceedings may have expoſed them. If upon the application for the injunction the queſtion had been put, whether the Court would expoſe the defendant in that cauſe to the hazard of loſing the rents and profits of the premiſes by the death or inſolvency of the plaintiffs, and the Court had been reminded of the juſtice due to the defendant in its full extent, it is impoſſible that injunction ſhould have been granted without the terms, that a fair rent for the premiſes ſhould be brought into Court from time to time, that the Court might be in poſſeſſion of a fund, that would enable it to do juſtice, whatever accident might happen during the time neceſſary for the conſideration of the queſtion, whether he, who had recovered at law, could ſuſtain the benefit of that judgment.

Whether action for meſne profits can be maintained before judgment in ejectment, *Quære*.

It has been ſaid by Mr. *Fonblanque*, the action for meſne profits may be maintained, though no judgment has been obtained in ejectment.

(*a*) *Pleydell* v. *The Earl of Dorcheſter*, 7 *Term Rep. B. R.* 529.

ejectment. I will not truſt myſelf with the deciſion of that queſtion in this cauſe. In *Norton* v. *Frecker* (*a*) Lord *Hardwicke* ſays, treſpaſs will not lie for meſne profits, till the poſſeſſion is recovered by ejectment. I will not ſay, there can be no action, founded upon the old learning: but under theſe circumſtances I am not bound to determine that; for, if in the ordinary action for meſne profits the plaintiff might have recovered what he now ſeeks in equity, and if under the circumſtances of this caſe he has been reſtrained from proceeding in that action, and all conſcientious views of the caſe require me to ſay, he would have been reſtrained in any other action from receiving them, it would be very hard, that, becauſe he did not make the experiment, whether that other ſpecies of action could be maintained, the Court will give him no relief. If there be a principle, upon which courts of juſtice ought to act without ſcruple, it is this; to relieve parties againſt that injuſtice occaſioned by its own acts or overſights at the inſtance of the party, againſt whom the relief is ſought. That propoſition is broadly laid down in ſome of the caſes. The caſe, in which the Court would not relieve, though the intereſt went beyond the penalty of a bond, ſtill ſtrikes me as a very ſtrong caſe. If the plaintiff ſubmitted to nothing, by the mere circumſtance of filing the bill he would be taken to ſubmit to every thing conſcience and juſtice require. Upon that principle he would be held to do that, which is juſt; and the Court duly acting with him would compel him to pay the principal, intereſt and coſts, occaſioned by his delay. It may be ſaid, that is a relief given againſt a plaintiff, coming for relief. I conſider theſe perſons as plaintiffs, aſking an injunction, and impliedly ſaying, they aſk it upon the terms of putting this plaintiff in exactly the ſame ſituation, as if it had been determined, they were not entitled; for otherwiſe there is no colour of juſtice calling upon the Court to diſcuſs the queſtion, whether they are entitled to equitable relief. The caſe of a *remanet* at *niſi prius* was put. If the application is founded in fraud, or concealment, or miſrepreſentation, I am not prepared to ſay, a court of equity might not find the means of relief in that ſort of caſe: but it is very different, where the party applies, not upon his notion of what the law is, but upon the fact; to the exiſtence of which he does not adminiſter by his conduct. Upon that it ſeems there

No relief, where the intereſt goes beyond the penalty of a bond, if occaſioned by the delay of the plaintiff, the obligor.

(*a*) 1 *Atk.* 524.

can be no relief in equity; for it is not the act of the parties; but a neceſſity ariſing out of the act of third perſons, affecting their rights; not done at the inſtance of either of them; the occaſion not furniſhed by their acts. The caſe was alſo put of a creditor prevented from obtaining judgment by the act of this Court; and the queſtion, whether he ought to be conſidered as a judgment creditor. I will not ſay, what the anſwer might be to the caſe, put ſo generally. A court of law always takes care, that a creditor ſo prevented ſhall be put in the ſame ſituation, as if he had his judgment, and no ſuch application had been made; and I rather think, in every inſtance of an application for an injunction it is the duty of the Court to conſider, whether the party ought not to have the benefit of his judgment; and if the Court decides wrong, I ſhould be ſorry, if the Court had not the means of reinſtating him.

A creditor prevented by the act of the Court from obtaining judgment put in the ſame ſituation, as if he had it.

The ground therefore, upon which this caſe is decided, is, that the *rei geſtæ* ſhew, that Dr. *Warren* has amalgamated and mixed himſelf with the other tenants. The equity as to all of them ariſes from their joint act, operating to prevent the plaintiff from having that redreſs at law, which in all moral probability he would have had, if this Court had not interfered; and which in all moral juſtice he ought to have had. I had conſiderable doubt, how far back the account ought to go. It ought to go back, as far as natural juſtice requires. Where there has been an adverſe poſſeſſion, and upon an application to this Court upon grounds of equitable relief the plaintiff appears entitled to an account of the rents and profits, if there has been a mere adverſe poſſeſſion, without fraud, concealment, or an adverſe poſſeſſion of ſome inſtrument, without which the plaintiff could not proceed, the Court has ſaid, the account ſhall be taken only from the time of filing the bill; for it is his own fault not to file it ſooner. But the queſtion here is, not, what relief is due to the plaintiff with regard to the period, at which this bill was filed, but attending to the circumſtances ſtated by this bill, forming the facts of the prior cauſes in this Court. Attending to thoſe circumſtances, the queſtion is, if it had not been for what paſſed in thoſe prior cauſes, would not this plaintiff have recovered from 1791; and do not the circumſtances of thoſe cauſes demonſtrate, that he was ſubſtantially and in conſcience proceeding adverſely from that

Account of rents and profits confined to the filing of the bill, filed upon grounds of equitable relief againſt a mere adverſe poſſeſſion, without fraud, &c.

period, until he was reſtrained from farther proceedings; giving notice to quit; and making a formal demand of the poſſeſſion; abſtaining, as, they ſay themſelves, it was fit he ſhould abſtain for ever, from bringing any other action except that againſt Lady *Cavan*. He has therefore demanded the rents and profits from 1791 down to the decree in the other cauſes. If he had brought an action for meſne profits, as ſoon as he could upon the ejectment, the production of the record would have entitled him from the day of the demiſe. But it is equally clear on the other hand, that would not neceſſarily have prevented him from recovering from the time his title accrued; provided he gave them an opportunity of queſtioning that title; for I take it to be clear, he is not bound to demand no more than from the day of the demiſe. He may, if he pleaſes to put the title in hazard, inſiſt upon the meſne profits from the time the title accrued; ſaving only the benefit of the ſtatute of limitations: but then he muſt prove his title. He would therefore have been entitled to the rents and profits from 1791. If ſo, upon what ground is he not entitled in equity from the ſame period.

The decree muſt therefore be according to the prayer of the bill. As to the mode of eſtimating the meſne profits, it will be better, that they ſhould ſettle that among themſelves.

May 16.

Ex parte HUNTER.

Though unliquidated damages cannot be proved under a commiſſion of bankruptcy, yet, if the demand is partly of that nature, and partly liquidated, as the difference of price upon a reſale, the creditor having a ſecurity may apply it firſt to the former, then to the latter, and may prove the reſidue.

Lien under the uſual condition at an auction, that if the vendee ſhould fail to complete his purchaſe the vendor ſhould be at liberty to reſell; and the vendee pay the expences and make good the deficiency, *&c.*

By articles, dated the 23d of *November* 1795, between *Smith*, an auctioneer, as agent for the petitioners, truſtees in a marriage ſettlement, and *Jenkins* and *Aubrey*, in conſideration of 200*l.* paid to *Smith* by *Jenkins* in part of 4670*l.* it was agreed, that upon payment of 4470*l.* upon the 23d of *September* next certain eſtates ſhould be conveyed to *Jenkins* in fee; and it was provided, that if the purchaſer ſhould fail to complete his purchaſe according to the agreement, the ſaid ſum of 200*l.* ſhould be forfeited to the vendors; who ſhould be at liberty to reſell the eſtate; and *Jenkins* ſhould pay all expences attending the ſame; and make good all deficiency of price and loſs of intereſt of the purchaſe money.

Jenkins failed in completing the purchaſe; and upon the 1ſt of *Auguſt* 1797 the eſtate was put up to auction at *Swanſea;* at which auction *Jenkins* again was the purchaſer at the ſame price, 4670*l.*; and *Smith* received a joint note of *Williams* and *Aubrey* for 470*l.* in part. This ſale took place upon the uſual terms; a depoſit of 10*l. per cent.*; and if the purchaſer ſhould fail to comply with the conditions the depoſit to be forfeited; and the proprietors to be at liberty to reſell; and the deficiency, if any, by ſuch ſale, together with all charges attending the ſame, to be made good by the defaulter.

Jenkins again failed in completing his purchaſe; and upon the 9th of *February* 1798 the eſtate was ſold at *Garraway*'s for 2950*l.* Upon the 14th of *July* 1798 a commiſſion of bankruptcy iſſued againſt *Jenkins.* The petitioners attempted to prove a debt of 1349*l.* 11*s.* 4*d.* in reſpect of the difference upon the reſale and the expences; including the following articles:

Auctioneer's charges upon the reſale -	£. 70	11	0
Intereſt - -	99	11	7
Auctioneer's charge - -	44	10	0
Moiety of auction duty - -	36	17	6
Solicitor's charges - -	30	18	6

The amount of the depoſits, and 200*l.* paid by *Jenkins* on account, were deducted from the proof. The commiſſioners rejecting the proof, the prayer of the petition was, that they might be ordered to receive it.

Mr. Cooke in ſupport of the petition—In *Bowles* v. *Rogers* (*a*) a ſimilar caſe, Lord *Roſslyn* having directed a reſale upon farther directions,

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(*a*) In Chancery, 31ſt *July* 1800. The Bill was filed by a perſon claiming title under the will of Sir *Richard Bampfielde*, dated the 17th of *March* 1775, againſt the aſſignees of a bankrupt; *inter alia*, to compel a ſpecific performance of an agreement made by the bankrupt with the plaintiff, as truſtee, for the purchaſe of eſtates of Sir *Richard Bampfielde*; or, if the defendants ſhould be unable or unwilling to perform the contract, that the eſtates might be reſold; and if the purchaſe-money ariſing by the reſale, together with the directions, ordered the deficiency upon the reſale to be proved; ſaying, the whole purchaſe-money was the debt. It was taken, as if it was a mortgage. This is a contract to pay a certain ſum of money at a given day; and falls exactly within the ſtatute (*b*), providing, that debts payable at a future day may be proved.

Mr. Lloyd for the aſſignees—Attending to the circumſtances and the nature of this demand, the caſe cited is not applicable; that going merely upon the difference of value, a mere matter of calculation. The demand under this commiſſion is, not the purchaſe-money or any other certain ſum; but the difference in value between the ſales, and the intereſt and expences. They were not liquidated at the time of iſſuing the commiſſion; and could be recovered only in an action for damages. It is impoſſible therefore, that they could be within the ſtatute referred to. Beſides the difference between the two ſums, deducting the depoſits, there are the intereſt, the charges of the auctioneer, a ſubject for evidence before a jury, a moiety of the auction duty, and the ſolicitor's charge. Theſe items are perfectly uncertain; and clearly take this caſe out of the ſtatute; which relates to future debts having no contingency in them. What Lord *Kenyon* ſays in *Utterſon* v. *Vernon* (*c*) is very applicable. In the other caſe nothing was to be done but to calculate the difference between the two ſums; and that was going a great way. But great part of this demand was wholly unaſcertained, when the commiſſion iſſued; and was only capable of being aſcertained by a jury.

Mr. Cooke in reply—By this contract it was agreed, that the purchaſer, if he ſhould not perform his contract, ſhould be at the expence of the reſale. The petitioners not having conveyed the

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the depoſit, ſhould not amount to 37,240 *l.* the original purchaſe-money, that the plaintiff might be admitted a creditor under the commiſſion for the amount of the deficiency.

Upon the 17th of *November* 1797 a decree was made for a reſale. The deficiency upon that reſale was 5016 *l.*; and the cauſe coming on for farther directions, the Lord Chancellor directed that ſum to be proved under the commiſſion; ſaying, the whole purchaſe-money was the debt; and the vendor had a lien upon the eſtate; which proving by the reſale deficient, the reſidue was to be proved under the commiſſion.

(*b*) *Stat.* 7 *Geo.* 1. *c.* 31. *ſ.* 1.

(*c*) 3 *Term Rep. B. R.* 539. 4 *Term Rep. B. R.* 570.

eſtate, had a pledge, the title deeds; and therefore is entitled to apply the produce of the property, when ſold, to that debt, which he could not prove under the commiſſion, *viz.* the intereſt and expences, in the firſt inſtance, and then in reduction of the debt. Where a creditor by a debt ariſing partly previous, and partly ſubſequent, to the act of bankruptcy has a pledge, he may apply the pledge to the latter firſt; which was determined by Lord *Thurlow*, *ex parte Howard* (*a*). This is very like the caſe of a pledge. If the eſtate had turned out to be of greater value than 4670 *l.* the aſſignees could not have redeemed, and inſiſted upon performing the contract, without giving the petitioner the intereſt and expences.

Lord Chancellor—Nothing is more clear, than that unliquidated damages cannot be proved: that was determined in *Utterſon* v. *Vernon*. That was a contract to replace ſtock upon demand. A bankruptcy happened; and no demand was made before the bankruptcy. The majority of the Court of *King's Bench* at firſt thought, it could be proved: afterwards the Court were unanimouſly of opinion, that it could not; and that clearly was Lord *Thurlow*'s opinion. But this is very different. This is a ſale under a contract for the purchaſe of an eſtate; by which the purchaſer became owner of the eſtate; and the ſeller parted with it. The condition, in caſe the purchaſer ſhould fail to complete his contract, that there ſhall be a reſale, and the purchaſer ſhall make good the loſs and anſwer the expences, forms a lien upon the eſtate for the purchaſe-money. It is in ſome reſpects like a mortgaged eſtate, ſold to pay the mortgage money; and the reſidue is the debt to be proved: but, ſtrictly ſpeaking, it is not in the nature of a mortgage; for if the ſecond ſale produced more than the original purchaſe-money, the purchaſer, who had violated his agreement, could not call for an account of the ſurplus; as if he was really a mortgagor: but the vendor contracts for this; that if the ſecond ſale produces leſs, he ſhall be conſidered as a mortgagee; and ſhall be a creditor for the reſt. With reſpect to the objection to this proof, the difference between the ſums produced by theſe ſales is a clear liquidated debt. As to ſome items of the account, I agree, they could not be proved: but,

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(*a*) 1 *Cooke's Bankrupt Law*, 120. ed. 4.

conſidering the equity of the vendors; they may have the effect by a circuitous mode. I remember an inſtance of a mortgage made as an indemnity againſt acceptances of caſh advanced by the mortgagee. Some of the bills had been paid before the bankruptcy: but he was under acceptances of bills floating at the time of the bankruptcy, which were not capable of being proved: but he had a right to model his ſecurity; applying it firſt to thoſe bills, which he could not prove.

Upon the authority of thoſe caſes then the vendors in this caſe have a right to apply the ſum, produced by the laſt ſale, firſt in payment of thoſe articles, which it is juſt they ſhould receive, but which they could not prove under the bankruptcy; and thoſe articles being taken out of that ſum will leave the ſum capable of being proved. In that circuitous way therefore they are entitled to prove.

Let the Commiſſioners inquire into thoſe articles: they are to be firſt ſatisfied out of the 2950*l.*; deduct the reſidue from the original purchaſe-money; and let the balance be proved.

Rolls.
May 19.

Ex parte THE AMICABLE SOCIETY OF LANCASTER.

The ſtatute 33 *Geo.* 3. *c.* 54. giving preference to friendly ſocieties, having money due to them from their officers dying or becoming bankrupt or inſolvent, does not extend to debts due from them individually, and not in their official characters.

THE petition, preſented by *John Corleſs*, ſtated, that previouſly to *February* 1792, *James Parkinſon*, a member and treaſurer of the Amicable Society of *Lancaſter* for that year, having as ſuch treaſurer got into his hands the ſum of 70*l.* belonging to the ſociety, and the ſociety being alſo poſſeſſed of the further ſum of 30*l.*, ſuch ſum was in *February* 1792 paid into his hands as treaſurer; and thereupon he executed a bond, dated the 13th of *February* 1792, to the petitioner, alſo a member of the ſociety, and appointed co-treaſurer with him, in the penal ſum of 200*l.*; with a condition to be void upon payment by *Parkinſon*, his heirs, executors, or adminiſtrators, to the petitioner, his executors, adminiſtrators, or aſſigns, in truſt for the ſociety, of 100*l.*, with intereſt at 4*l.* 15*s.* *per cent.* upon the 13th of *February* next.

In *October* 1797 *Parkinſon* died inteſtate; and his widow took out adminiſtration. The petition was preſented under the act of Parliament (*a*); alleging notice, before the adminiſtratrix had fully adminiſtered: the affidavit in ſupport of it ſtating, that ſhe knew of this debt before her huſband's death; and that, except the ſum of 35 *l.* which was lent to *Parkinſon* by the ſociety, the money came to his hands as treaſurer, while he was in office.

The adminiſtratrix by her affidavit ſtated, that her huſband died indebted to the crown as poſtmaſter, to his landlord for rent, and by bond and mortgage, to an amount exceeding his real and perſonal eſtate; and that ſoon after his death ſhe gave warrants of attorney; being threatened by the creditors. She denied, that any application was made to her, or, that ſhe had any notice of this debt, till eight months after his death. She alſo ſtated, that this money, or the greater part of it, had been lent to him under a vote of the ſociety; and conſiſted of money called in for that purpoſe; and was not in his hands as treaſurer.

Whether the preference to friendly ſocieties under the ſtatute 33 *Geo.* 3. would prevail againſt the Crown; *Quære.*

(*b*) *The Maſter of the Rolls*—The words of the act are very large; ſufficient, as it ſeems, to give this preference againſt debts due to the crown; though perhaps it would not be ſo conſtrued. The debts to be preferred are, not generally all debts due to the ſociety, but only debts due from an officer or truſtee of the ſociety: but if the ſociety truſts any perſon upon his private ſecurity, thoſe debts have no preference. The queſtion therefore is, whether this money came to the hands of *Parkinſon* as truſtee of the ſociety. Upon the whole I am of opinion, this money was not left in his hands as a member of the ſociety, but was voluntarily left in his hands, after he ceaſed to be truſtee, upon his ſecurity. It is really incumbent upon theſe ſocieties to give early notice to the perſonal repreſentatives, and not to lie by and let

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(*a*) Stat. 33 *Geo.* 3. *c.* 54. *ſ.* 10. enacting, that if any perſon appointed to any office by any ſuch ſociety, and entruſted with, or having in his hands or poſſeſſion, any monies or effects belonging to ſuch ſociety, or any ſecurities relating to the ſame, ſhall die, or become a bankrupt, or inſolvent, his executors, or adminiſtrators, or aſſignees, ſhall deliver over all things belonging to ſuch ſociety, and ſhall pay out of the aſſets or effects all ſums of money remaining due, which ſuch perſon received by virtue of his ſaid office, before any of his other debts are paid or ſatisfied.

(*b*) *Ex relatione.*

them adminiſter the aſſets. The act does not limit any time for making the demand upon the adminiſtrator.

The ground, upon which I diſmiſs this petition, is, that this money was not received by him as an officer of the ſociety.

Rolls.
May 29.

CONSTANTINE *v.* CONSTANTINE.

Rules of conſtruction of wills: Every word to have effect, if not inconſiſtent with the general intention; which is to control: If two parts are totally inconſiſtent, the latter prevails: If a meaning can be collected, but it is wholly doubtful, in what manner it is to take effect, it is void for uncertainty.

THIS bill was filed by executors to have the rights of the parties under the following obſcure will of *John Conſtantine*, a goldſmith, aſcertained. After directing his debts, funeral expences, &c. to be paid out of his eſtate and effects by his executors, and appointing his nephews *Richard* and *Jonathan Conſtantine* to be his executors, he proceeded thus:

" I give and bequeath all my houſehold furniture of every " deſcription, plate and linen, china, watches, rings, diamonds, " pier glaſſes, images, pictures, and all the books, and my mean- " ing is that ſhe ſhall have all my cloaths at her own diſpoſal, and " every thing within the houſe, unto my dearly beloved wife " *Margaret Conſtantine*, for her own uſe. I alſo give and be- " queath unto my dearly beloved wife *Margaret Conſtantine* upon " truſt during her life the intereſt of ſundry funds now ſtanding in " my name at the Bank of *England*, that is to ſay, new 5 *per cents.* " 4 *per cents.* 3 *per cent.* conſols, 3 *per cent.* Reduced Annuities, " 3 *per cent.* Annuities 1726, 3 *per cent.* Imperial Annuities, Short " Annuities, Long Annuities, Imperial Annuities, and New South " Sea Annuities and it is my will and deſire that my executors " grant a power of attorney to my ſaid wife or to whom ſhe " ſhall appoint to receive her dividends. My will is that my " executors ſell ſtock if wanted but what remains unſold to be " kept in my name until after the death of my dear wife. I give " my ſaid wife 1000*l.* 3 *per cent.* conſols, to be paid her immedi- " ately after my deceaſe, provided there is not money ſufficient " to pay her out of monies in hand. I give unto my niece *Jane* " *Conſtantine* daughter of my brother *Henry Conſtantine* deceaſed

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“ 3000*l.* reduced annuities after the death of my dear wife I
“ leave my brother *John Conſtantine* of *Settle Yorkſhire* 30*l.* *per*
“ *annum* from my death during his life allowing now 20*l.* a year
“ from the rent of the houſes I have upon mortgage and after
“ my brother's death I give to his ſon *Richard Conſtantine* my
“ executor for ever The chariot and every thing belonging
“ thereto I give to my dear wife and the proviſion I have made
“ for her will I hope be enabled to keep it To each of my
“ executors I give 50*l.* each as they will be benefited hereafter
“ when the ſtock comes to be transferred after the death of their
“ aunt *Margaret Conſtantine* I leave to *Jane Conſtantine* my
“ niece's mother 10*l.* a year during her life and *Jane Conſtantine*'s
“ brother *Henry Conſtantine* 20*l.* a year for his life to commence
“ at my deceaſe and his ſhare of the ſtock that will fall to
“ him hereafter ſhall be tied up that he ſhall only have the intereſt
“ during his life and then to come to ſiſter *Jane* along
“ with her ſhare ſhe have with him which is my will and
“ deſire to be tied up for the iſſue of *Jane Conſtantine* after
“ her deceaſe but every one's ſhare to be transferred in ſtock
“ The iſſue of my brother *John Conſtantine* children ſhare and
“ ſhare alike the iſſue of ſiſter *Alice Woodhead* the ſame and
“ brother *William Conſtantine* children the ſame And this is
“ my laſt will and teſtament ſet my hand and ſeal this 25 day
“ of *January* 1799.”

The teſtator died on the 26th of *January* 1799, without iſſue; leaving his widow and ſeveral nephews and nieces ſurviving. His ſtock conſiſted of 1200*l.* new 5 *per cents.*: 1000*l.* 4 *per cents.*: 7000*l.* 3 *per cent.* conſolidated annuities: 3000*l.* 3 *per cent.* reduced annuities: 5100*l.* 3 *per cents.* 1726: 5000*l.* 3 *per cent.* imperial annuities: 100*l.* *per annum* ſhort annuity: 20*l.* *per annum* long annuity: 20*l.* *per annum* imperial annuity: 1008*l.* 6*s.* 8*d.* New South Sea annuities: 1100*l.* Exchequer bills. The teſtator was alſo poſſeſſed of leaſehold premiſes at *Settle* in *Yorkſhire*, houſehold furniture, ready money, and other perſonal eſtate.

By articles executed upon the marriage of the teſtator and his wife *Margaret*, dated the 13th of *January* 1769, he covenanted, that, if ſhe ſhould ſurvive him, ſhe ſhould have for her own uſe

all

all the rings, jewels, plate, and wearing apparel whatſoever, which ſhe then had, or which ſhould be given to her during the coverture, with all the plate, linen, houſehold goods and furniture, belonging to him at the time of his death; and in caſe there ſhould be no iſſue of the marriage living at ſuch time, then ſhe ſhould have to her own uſe three fourths of all ſuch other perſonal eſtate as he, or any perſon in truſt for him, ſhould be poſſeſſed of, intereſted in, or entitled to, at his deceaſe, after payment of his debts and funeral expences, and dower or thirds of his lands.

The cauſe ſtood for judgment.

The Maſter of the Rolls—I am at laſt under the very diſagreeable neceſſity of giving judgment upon a caſe, on which the judgment cannot be ſatisfactory to the Court, and by which I muſt be ſure I am not performing the intention. This teſtator, it appears, muſt have totally forgotten the whole ſtate of his property. The will itſelf ſtates circumſtances plainly ſhewing, that if he was competent to make a will, as I muſt now ſuppoſe, he had not about him that degree of recollection, which a teſtator diſpoſing of his property ought to have. I know no rule I can adopt more ſafely than that, which I did adopt in *Sims* v. *Doughty* (*a*), and upon which I have always acted, *viz.* to give effect to every word of the will; provided an effect can be given to it not inconſiſtent with the general intent of the whole will, taken together; for if the general intention can be collected, it is the duty of the Court to adapt every regulation to that general intent. If two parts of a will are totally inconſiſtent, and cannot poſſibly be reconciled, the proper rule, as I thought upon that occaſion, and ſtill think, is, that the latter ſhall prevail. Doubts have been entertained, where the ſame thing has been given to two perſons, whether they ſhould not be joint tenants: but the caſe, to which I allude, is, where two parts of the will are totally inconſiſtent; ſo that it is impoſſible for them to coincide. Another rule is this: if a meaning can be collected, but it is left wholly doubtful, in what manner that is to take effect, though I muſt to a certain degree run counter to the will, I know no other means than by declaring, as I muſt in this inſtance with regard to a very conſiderable part of the property, that the will is totally void for uncertainty.

(*a*) *Ante*, vol. 5. 243.

This teſtator appears to have totally forgot the covenant entered into upon his marriage. It is plain, the legacy to his wife of 1000*l.* 3 *per cent.* conſols is not a ſpecific legacy of the ſtock, of which ſhe was to have the dividends for her life; for he gives it, provided there is not money ſufficient to pay her out of the monies in hand. Upon her legacy there is no queſtion. Upon the next legacy of 3000*l.* reduced annuities for a long time I thought it a ſpecific legacy; and I ſhould have been of that opinion, if it had not been for the preceding legacy of 1000*l.*; which it is clear he did not mean to be a ſpecific legacy, by the effect of that proviſo, if there ſhould not be ſufficient money in hand to pay her the value of that 1000*l.* ſtock; leaving her in that caſe the dividends of the 1000*l.* ſtock afterwards. I am forced to put ſome ſuch conſtruction upon it. Therefore I muſt hold that legacy of 3000*l.* reduced annuities not ſpecific (*a*) but a legacy of quantity. Then, as to the bequeſt of an annuity of 30*l.* to his brother *John*, and what immediately follows that, I defy any man to tell, what he could mean. I ſhall only give to his brother that, which I am ſure the teſtator muſt have meant; that is, the annuity of 30*l.*: and not finding that charged, ſo as to be ſure, he meant it to be a charge upon the mortgage, I ſhall determine, that it muſt come out of the general perſonal eſtate. As to *Richard Conſtantine*, I once thought it a gift to him of the mortgaged premiſes: but I am not ſure the teſtator did mean that; and I muſt ſee, that *Richard Conſtantine* is entitled to take for ever that, which his father was to take for life. After the death of *John Conſtantine* therefore, *Richard* is entitled to a perpetual annuity of 30*l.*, but not charged upon the mortgages. He gives 50*l.* each to his executors; ſtating, that they will be benefited hereafter, when the ſtock comes to be transferred after the death of their aunt *Margaret Conſtantine*: but there is no mention of any ſhare or proportion, in which his executors ſhould take; which might be expected to follow. Adhering to the rules, that prevailed in *Sims* v. *Doughty*, I muſt declare, that the legacy of 3000*l.* reduced annuities is not ſpecific, but a legacy of quantity; that *John Conſtantine* is entitled to an annuity of 30*l.* for his life; and after his death *Richard Conſtantine* is entitled to an annuity of 30*l.* for ever out

of

(*a*) *Chaworth* v. *Beech*, *Innes* v. *Johnſon*, *Kirby* v. *Potter*, *ante*, vol. 4. 555. 568. 748. and the note (*b*) 750. *Raymond* v. *Brodbelt*, *Barton* v. *Cooke*, *ante*, vol. 5. 199. 461.

1801.

Constantine *v.* Constantine.

of the general perſonal eſtate, including the houſes; and declare, the diſpoſition of the ſtock after the death of the teſtator's wife, is void for uncertainty; and the reſidue is undiſpoſed of, and diviſible among the next of kin of the teſtator.

May 21.

Ante, vol. 5. 555.

The injunction, obtained upon a breach of covenant, in nature of a ſpecific performance, diſſolved upon the anſwer, contradicting the affidavits, and ſhewing conſent for ſeveral years.

BARRET *v.* BLAGRAVE.

The Solicitor General and Mr. *Grimwood* ſhewed cauſe againſt diſſolving the injunction, that had been obtained in this cauſe (*a*).

The anſwer ſtated, that the defendant had for a conſiderable time kept a tap-houſe in *Kennington Lane*; and had applied to the proprietors of *Vauxhall* Gardens for a leaſe of that ground, for the purpoſe of building a houſe; which they refuſed: but they agreed, that *Digby* and *Sandbank* ſhould take the ground to build on, which they did; and let the houſe to the defendant. The proprietors of *Vauxhall* knew the purpoſe, for which the houſe was intended; went over it with their ſurveyor; recommended, that tables ſhould be put up for the accommodation of the cuſtomers; and conſented to round off ſome of the paling of the gardens, to make the houſe more public. After the houſe was opened, the leaſe not having been executed, *Sandbank* refuſed to execute the leaſe with that covenant, unleſs they would conſent, that this trade ſhould not be conſidered a branch of the covenant; and a memorandum, dated the 31ſt of *July* 1790, in which year the houſe was opened, was prepared by the ſurveyor and ſigned; ſtating, that Mr. *Blagrave*'s preſent mode of uſing the houſe is not any injury to the proprietors of *Vauxhall*, nor contrary to the leaſe; upon which the leaſe was executed. The buſineſs was carried on from the 22d of *May* 1790, until the injunction was obtained, preciſely in the ſame way without objection. The defendant denies, that he retails liquors; and that he fitted up any room to accommodate perſons coming from *Vauxhall*: only one ſmall box with deal tables being placed there, with the conſent of the proprietors; and the perſons reſorting to the houſe conſiſt of hackney coachmen,

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(*a*) See the report, *ante*, vol. 5. 555.

mechanics, &c.; and the buſineſs is confined to the ſale of meat, as a cook's ſhop. The defendant denies, that any perſons reſort to this houſe from the public gardens for the purpoſe of refreſhment, and return afterwards.

In ſupport of the injunction the caſe of *Gibbs* v. *Cole* (a) was cited, as an authority for reading affidavits againſt the anſwer: but the Counſel for the defendant did not object to reading the affidavits produced on the former occaſion.

For the plaintiff—This injunction is in nature of a ſpecific performance. The application was made upon the ground, that this Court would have injoined the plaintiff from proceeding at law: the penalty being *in terrorem*, and not in the nature of ſpecific damages. There is certainly a conſiderable evidence of conſent: but the queſtion is, whether this ſort of evidence can be admitted to enable them to get rid of a covenant under ſeal.

Mr. Pemberton for the defendant—Under theſe circumſtances there is no pretence for this injunction; which was granted upon the ground, that above 100 perſons of a night have quitted the gardens, and gone to the defendant's houſe for refreſhment, and returned to the gardens: but the affidavits do not bear that out; amounting only to this; that 100 perſons of an evening have been ſeen in that houſe; whereby an injury is ſtated to have been ſuſtained by the proprietors of the gardens; and the other fact is denied.

The Solicitor General in reply—The two queſtions are, 1ſt, whether this buſineſs is within the covenant; and if ſo, 2dly, whether the evidence referred to in the anſwer ſhall get rid of it.

Lord CHANCELLOR—May not a very different queſtion be made; whether, if you have permitted this to go on for eleven years, you muſt not take your chance at law? I have not the leaſt doubt, that what is ſtated in the affidavits is within the terms of the covenant: but the queſtion is, whether you can have a ſpecific performance under ſuch circumſtances: the parties having from the execution of the leaſe eleven years ago permitted that covenant to ſtand an ineffective part of the leaſe. I rather doubt, whether, ſo far from the Court's interfering at your inſtance, a bill might not be filed to prevent your ſuing at law upon that covenant. If there are equitable circumſtances to prevent your taking your legal remedy, ſurely they will prevent your having a ſpecific performance.

(a) 3 P. Will. 254.

Injunction diſſolved.

On the 22d of *May* 1801 Sir Richard Pepper Arden, having reſigned the office of *Maſter of the Rolls*, was called to the degree of Serjeant at Law in *Lincolns-Inn Hall*, under the late act of Parliament (*a*), and appointed Chief Juſtice of the Court of Common Pleas, on the reſignation of that office by the Lord Chancellor; and was created a Peer, by the title of Baron Alvanley of *Alvanley*, in the county palatine of *Cheſter*.

Sir William Grant was appointed *Maſter of the Rolls*; and was ſworn a member of His Majeſty's moſt Honourable Privy Council.

(*a*) *Ante*, the beginning of the 4th volume.

May 22.

LORD GREY DE WILTON *v.* SAXON.

Injunction on affidavit to reſtrain the tenant of a farm from breaking up meadow, contrary to expreſs covenant, for the purpoſe of building.

Whether, if no expreſs covenant, it would do upon the ground of waſte, *Quære*.

The Solicitor General, ſupported by Mr. *Romilly*, moved upon affidavits for an injunction to reſtrain the defendant, a tenant to the plaintiff, from breaking up meadow for the purpoſe of building, contrary to the covenants of his leaſe.

The leaſe contained covenants not to convert any meadow land, and all the other uſual covenants in a leaſe of a farm, ſimilar to thoſe in *Pulteney* v. *Shelton* (*a*); ſhewing clearly the nature of the leaſe, for the purpoſe of tillage, as a farm.

(*a*) *Ante*, vol. 5. 147. 260, 261. and ſee the *errata* to that volume.

Lord **Chancellor** granted the injunction till appearance and farther order; obſerving, that he did ſo upon the ground of the covenant not to convert any meadow: otherwiſe he ſhould doubt, whether it would do upon the ground of waſte without an affidavit, that it was ancient meadow.

Mr. *Romilly* ſaid, that queſtion was much diſcuſſed in *Brydges* v. *Kilburne* (a), a caſe upon the converſion of a mill of one ſpecies to a mill of another ſpecies.

(a) Stated *ante*, vol. 5. 689. in *Jackſon* v. *Cator*.

THE MARQUIS OF DOWNSHIRE *v.* LADY SANDYS.

May 13. 22.

Injunction reſtraining tenant for life without impeachment of waſte from cutting timber growing for oranment or ſhelter, extended to clumps of firs on a common two miles from the houſe, having been planted for ornament.

Vide post. 419.

The power of tenant for life under the general words "without impeachment of waſte," not enlarged by implication from more extenſive powers given to truſtees for ſpecial purpoſes after her death.

Under indentures of ſettlement, dated the 2d of *Auguſt* 1798, Lady *Sandys* was ſeiſed of the manor of *Omberſley*, and the manſion houſe, called *Omberſley Court*, and other hereditaments in the county of *Worceſter*, as tenant for life, without impeachment of waſte; remainder to truſtees to preſerve contingent remainders; remainder to the Marquis of *Downſhire* for life, and, after payment of the ſums to be raiſed by the terms after created, without impeachment of waſte; with a ſimilar remainder to the Marchioneſs of *Downſhire*, and remainders over, ſubject to the ſaid terms, to Lord *Hilſborough* for life, without impeachment of waſte, and to his firſt and other ſons, and other remainders over.

The truſt of the terms was to raiſe money to diſcharge mortgages, and 3000*l*. for the executors of Lady *Sandys*; and the deed contained a proviſo, that till the ſaid ſums ſhould be paid, it ſhould be lawful for the truſtees at ſuch time or times after the deceaſe of Lady *Sandys* and in ſuch manner as they thought proper to enter into and upon all or any part or parts of the manors, &c. by the ſaid indenture limited in ſtrict ſettlement, and to fell and cut down ſuch timber and other trees as ſhould from time to time be wanted for building and other neceſſary purpoſes therein mentioned; and alſo to fell, cut down, and ſell any timber or other trees, which were at the time of the ſaid indenture ſtanding or growing, and which ſhould from time to time thereafter ſtand or grow upon the manors, *&c.* thereby limited in ſtrict ſettlement, or any part or parts thereof; provided, that ſuch falls of timber or other trees be made in due courſe, and at proper times of the year for felling ſuch timber or other trees; and ſo that the ſame do not in any wiſe injure the beauty of the ſaid capital meſſuage or manſion houſe, called *Omberſley Court*.

In this cauſe an injunction was obtained to reſtrain the defendant from cutting down or felling any trees or timber ſtanding or growing for ornament, ſhade or ſhelter, of the manſion houſe and buildings at *Omberſley Court*, or any other houſes or buildings on the ſettled eſtates, or which grow for ornament in any of the viſtas, avenues, walks, pleaſure grounds or plantations, belonging to *Omberſley Court*, or to any part of the eſtates, hereditaments, and premiſes, late belonging to *Edwin* Lord *Sandys* deceaſed, ſettled and conveyed by the indenture of ſettlement to the uſe of the plaintiffs, and from cutting down or felling ſaplings growing on any part of the ſaid eſtates not proper to be felled.

This injunction was continued till anſwer; and afterwards in *November* 1799 upon a motion to diſſolve the injunction an order was pronounced, continuing it till the hearing; but it was varied by leaving out the word "ſhade."

A motion was made for a ſequeſtration againſt the defendant for breach of the injunction by felling trees on *Lineal* common in the pariſh and manor of *Omberſley*, part of the ſettled eſtate. The affidavits in ſupport of the motion ſtated, that the trees felled were fir trees; which were planted with order and regularity in rows and clumps for ornament to the ſaid common; and which were highly ornamental, not only to the common, but to the ſurrounding country from the manner and very elevated ſituation, in which they were planted. They repreſented the diſtance of the neareſt plantation from the manſion houſe to be two miles.

The affidavits in oppoſition to the motion ſtated, that *Lineal* common is about three miles from the manſion houſe and grounds of *Omberſley Court*; and is ſeparated therefrom by land of other perſons, not the property of the defendant, as tenant for life; and is not even in ſight from the ſaid manſion houſe or any part of the grounds; and the common is open and uncloſed; upon which the copyholders have a right of common; which they enjoy; that the trees, that were on the common, were not planted for the ornament of, and were not an ornament to, any part of the eſtate; and though the trees were planted in clumps and rows, none of them were planted in viſtas, avenues and walks.

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The farther affidavits, filed in reply, ſtated, that the common may be ſeen from many parts of the grounds; and that parts of the eſtate are contiguous to the common.

Mr. Mansfield, Mr. Trower, and Mr. Thomſon, in ſupport of the motion—Mr. Richards, Mr. Sutton, Mr. Romilly, and Mr. Stratford, againſt it.

Lord CHANCELLOR—When this Court took upon itſelf to depart from the rule of law as to waſte, and interpoſe its reſtraining power, upon what is called equitable waſte, beyond the rule of law, one duty at leaſt was impoſed upon the Court; to define with preciſion and accuracy, in what caſes the Court would interpoſe, and to take great care, that in the terms of its injunctions a language ſhould be adopted, that might be clearly underſtood by the parties, whoſe rights were to be bound at ſuch a peril as that of diſobeying an injunction of this Court. But the Court has in all times upon this ſubject adopted language exceedingly difficult to be underſtood. In arguing caſes of this ſort I have been aſked from this place, what I meant by "thriving timber, timber-like trees, and ornamental timber;" and I have not been able to give any further anſwer than by referring to the language of the Court in former inſtances.

Upon this queſtion I cannot admit the argument, that my mind is to be influenced in any degree by the propriety of the injunction. If it goes beyond the terms, in which other injunctions have been granted, or the reach of the principle, and I think this injunction does not, the true line of conduct would have been to have applied to the Court to alter the terms of the injunction, and not to have riſked a diſobedience to it. A party diſobeying an injunction is not at liberty to ſhelter himſelf by ſaying, the Court was wrong in granting the injunction in ſuch terms. The caſe ſtands before me upon this dry queſtion; whether the defendant is within the meaning of this injunction prohibited from cutting the trees upon *Lineal* common. By the terms uſed in this injunction I underſtand trees very diſtinguiſhable from trees, to which the word "ornamental" only can be applied. Many trees may be ornamental, and yet not within the meaning of the words in a proceſs of this kind "ſtanding or growing for ornament." It is difficult to comprehend theſe trees under the words "viſtas, avenues," *&c.* The parties certainly have been always left by the language of the Court at great hazard, to determine, what is or is not timber growing for ornament. In *Chamberlayne* v. *Dummer* (*a*), the caſe of Mr. *Johnes* (*b*) and his mother, and a great variety of others, perſons of taſte upon this ſubject have differed; and the taſte of Mr. *Brown* has been ſet up againſt the taſte of former ſyſtems. The principle, upon which the Court has gone, ſeems to be, that, if the teſtator or the author of the intereſt by deed had gratified his own taſte by planting for ornament, though he had adopted the ſpecies the moſt diſguſting to the tenant for life, and the moſt agreeable to the tenant in tail, and upon the competition between thoſe parties the Court ſhould ſee, that the tenant for life was right, and the other wrong, in point of taſte, yet the taſte of the teſtator, like his will, binds them; and it is not competent to them to ſubſtitute another ſpecies of ornament, for that, which the teſtator deſigned. The queſtion, which is the moſt fit method of cloathing an eſtate with timber for the purpoſe of ornament, cannot be ſafely truſted to the Court. The principle has been extended from ornament of the houſe to out-houſes and grounds, than to plantations, viſtas, avenues, to all the rides about the eſtate for ten miles round. If that principle has been rightly applied, it is very difficult in argument to ſay, it cannot be applied to a common as well as in-field lands; and that the contiguity or remoteneſs, if *de facto* it was planted for ornament, can alter the principle, upon which

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(*a*) 1 *Bro. C. C.* 166. Other Orders, *June* 1789, and 3 *Bro. C. C.* 549.

(*b*) *Johnes* v. *Johnes*, *Hil.* 1797. Other Orders of Injunction againſt cutting ornamental timber were made in *Lord Caſtlemain* v. *Lord Craven*, *December* 1733. *Leighton* v. *Leighton*, *March* 1747-8. *O'Brien* v. *O'Brien*, *May* 1751. *Jebb* v. *Jebb*, *April* 1792. See *Lord Tamworth* v. *Lord Ferrers*, *poſt.* 419.

the rule of the Court is to be applied. As to its being, not part of the eſtate, but the property of the Lord, with common rights, ſuppoſe a manor houſe at one ſide of the extremity of a very large eſtate; and a common is on the eaſt ſide of the houſe, and upon that common the lord has planted ornamental trees in the ſame form as in the in-field lands upon the weſt ſide of the houſe: thoſe trees being admitted to have been planted for ornament, will the injunction be confined to the weſt ſide, and not extended to the common? If contiguity, which exiſts in the caſe I now put, is neceſſary, can it be ſaid, that if there is a very ſmall ſlip of land, a ſingle field, and the owner of the eſtate has been exerting all the providence of his life in endeavouring to purchaſe that ſlip, and in the hope of ſucceeding has planted the common, that circumſtance will alter the rule of the Court, and prevent the injunction from going to the plantation, admitted to be planted for ornament? Is contiguity neceſſary for the whole of the land, or for a ſmall part? Will the greater or leſs degree of remoteneſs alter it? I am of opinion, it will not. I agree, the facts of contiguity, remoteneſs, *&c.* are very fit to be conſidered, when the fact, whether the common was planted for ornament, is under diſcuſſion: but if the true concluſion is, that it was for ornament, why is not that common to be conſidered as much a part of this eſtate to be protected as any other part of the eſtate?

My conſtruction therefore of this order is, that it will embrace trees or timber planted upon the common in queſtion as part of the eſtate; and I think, the injunction ought to go thus far; for it is evident, the views of the author of the ornament of this eſtate will be wholly diſappointed, if the protection is not afforded in the extent of this injunction. Looking at all the eſtates in the north of *England*, where the country is not in ſo high a ſtate of cultivation, and in part of *Nottinghamſhire*, can any man decline ſaying, that theſe clumps of firs upon the ſurrounding and adjoining commons, ſevered in many inſtances, the lands being divided in ownerſhip, ought not to be protected? If the in-field lands and plantations are protected, is it not fit alſo to protect that, which is ſcattered round, and is really part of the ſame plan of improvement? It is impoſſible, that a principle for general application can depend upon the circumſtance, whether a little ſlip of land connects the eſtate with the common, or is interpoſed between

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tween them; or, whether the common is in ſight. Suppoſe, it is ſituated on a different ſide of a hill from the houſe: if the ſyſtem of plantation for the ornament of the eſtate embraced the whole circuit of the hill, will it be ſaid, that is not to be protected, becauſe it is on the other ſide of the hill? So, if it is at the diſtance of two miles: it is a very material circumſtance upon the queſtion of the fact; whether it was planted for ornament, or not: but, if it could be ſeen from the grounds, or, if it was the ride of the family for pleaſure, that is evidence, that it was planted for ornament; and the diſtance is only a circumſtance of fact, material as evidence to decide the fact, whether the trees are growing for ornament, or not.

Upon the affidavits, the expreſſion "afford ornament" is equivocal; whether they were planted for ornament; or, whether the effect is ornament. That affidavit alone would be much too looſe for granting the proceſs of injunction. But the next affidavit ſtates, that they were planted in this manner for ornament; and adds, that they were highly ornamental, not only to the common, but to the ſurrounding country. That I muſt lay out of the queſtion; for there is no inſtance of arguing, that an injunction is to be granted upon that ground, that the trees are ornamental, not to the eſtate, upon which they grow, but to the ſurrounding country. Theſe affidavits, which go to the fact, that theſe trees were planted for ornament to the common, grounded on the notion, that the common is part of the eſtate within the meaning of the injunction, are met by an affidavit; which proves, that this Court decides at great hazard as to facts upon written depoſitions; for the facts are not fairly ſtated by it. The original affidavits, which were confined to the queſtion of ornament to the common, left the matter exceedingly ſhort, whether the trees could be ſeen from the grounds, forming part of the eſtate, which might or might not be connected, not by contiguity, but by approach. They would have laid a material fact before the Court by ſtating, to what extent and in what degree the common could be ſeen from the eſtate, and was ornamental to it. The farther affidavits diſcloſe the fact, that the common may be ſeen from many parts of the grounds; and is with theſe plantations a very ornamental object; that there are eſtates, part of this eſtate, contiguous to the common; and upon the argument I find, it is not diſtinguiſhable from two other heaths, planted in this way; as to which an injunction has been granted. Upon what ground am I to refuſe this injunction but the ſimple fact, that this common was at a conſiderable diſtance, and that ſingle affidavit, contradicted by a great number of others, aſſerting, that theſe trees were planted for ornament; and if ſo, I ſhall not inquire, whether they are ornamental; which is not an inquiry for me. I muſt hold therefore, that this injunction has been violated. If my mind could by the affidavits be brought into doubt, whether theſe trees were really planted for ornament, or not, I ſhould be diſpoſed to relieve myſelf from deciding ſuch a queſtion by directing an iſſue; taking care, that if in the reſult of ſuch a direction the defendant ſhould be prejudiced by not being permitted to cut in the mean time, the plaintiff ſhould undertake to pay the value, if the deciſion ſhould be againſt him: but, attending to the value of the property, and the contraſt between the affidavits, and the circumſtance, that it is impoſſible to conceive, why theſe trees were planted, unleſs for ornament, without attending to the queſtion, whether they are more or leſs ornamental, I think, the preponderance of evidence is in the plaintiff's favour; and the ſingle affidavit in oppoſition to it is too ſhort even to obtain an iſſue. The value of the trees cut muſt therefore be accounted for by the defendant; or the proceſs of ſequeſtration muſt go; unleſs you can bring that fact into more doubt.

May 22.

After this deciſion a motion was made on the part of the defendant to diſcharge all the orders upon a new and diſtinct ground; *viz.* the particular expreſſion of the deed of *Auguſt* 1798, in the proviſo contained in the power to the truſtees to fell timber; which, it was contended, ſhewed, that the protection was intended by the parties to be confined to the trees, the fall of which would injure the beauty of the manſion houſe; and that intention being expreſsly ſtated by the parties, the injunction ought not to go beyond it.

The caſe was argued upon this ground: the plaintiffs inſiſting that the intention of the parties could not have been ſo reſtrained;

and that the manſion houſe was particularly mentioned only as the principal part of the eſtate.

Lord CHANCELLOR—With regard to the conduct of the parties at the time they entered into this agreement, I do not ſay a word; having endeavoured to cultivate a habit not to weigh the motives, which induced parties to enter into a contract, when I am to decide upon the legal effect of that contract. The queſtion is a dry queſtion of law, whether theſe parties, either in a ſtrict ſenſe claiming under Lord *Sandys*, or thoſe, under whom he claimed, or in an accurate ſenſe, though not ſo ſtrict a ſenſe, claiming under him, that is, holding the eſtate between them according to ſome limitation under him, can be ſaid by this deed to have impoſed upon the Court the neceſſity of declaring, that in this contract the words "without impeachment of waſte" cannot admit of the conſtruction given to them by this injunction, as it now ſtands. In deciding that queſtion the difficulty I have is of this ſort; that I am obliged to impute to parties in the conſtruction of this deed an intention to uſe terms according to their legal import; though I am perfectly ſatisfied, none of the parties underſtood the terms of the deed; and I doubt, whether even thoſe, whoſe buſineſs it was to frame the deed, correctly underſtood the effect of it. This at leaſt is clear; that Lady *Sandys* claiming an eſtate for life without impeachment of waſte, upon the deed in general, muſt be underſtood upon the deed to claim that eſtate with ſuch powers as the law of the land, adminiſtered in a Court of law, ſubject to ſuch reſtraints, to which that law is ſubject, as adminiſtered in a Court of equity, gives her, as to felling timber; and neither party can allege ſurpriſe in finding their legal rights affected by thoſe reſtraints. With reſpect to the queſtion, whether there is context enough in this deed to authoriſe me to ſay, the defendant can do thoſe acts, which in general a tenant for life expreſsly without impeachment of waſte is entitled to do, becauſe ſome other perſons are authoriſed after her death to cut timber under the particular terms ſpecified in the power of the truſtees, I do not know, that it is a neceſſary inference, that one party ſhall have a power to-day, becauſe another party has a power capable of being exerciſed to-morrow. The whole muſt be taken together. The conſideration, upon which the plaintiff may be taken to give this power to the defendant, may be this very condition; that

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Difference between the powers of tenant for life without impeachment of waſte and truſtees under the ſame words; the latter are bound to a provident execution of their powers.

that the power in this general language, *ultra* what a tenant for life without impeachment of waſte has, ſhall not be exerciſed againſt him until the death of that tenant for life. I cannot weigh the conſideration: but I am not at liberty to ſay, it is of no value. It is not to be denied, that the terms "without impeachment of waſte," as applied to truſtees of a term for ſpecial purpoſes, have a very different ſenſe from that of the ſame words annexed to a tenancy for life; and in the ordinary caſe I do not apprehend the Court would have permitted the truſtees to execute their truſt by cutting timber, merely, becauſe they were truſtees without impeachment of waſte; though they might at law. This Court would ſay, that having a diſcretion they muſt act in their truſt, as the Court itſelf would act. There is no pretence therefore to ſay, that limitation would in the ordinary caſe enable them to cut timber; much leſs that ſpecies of timber, which a tenant for life unqueſtionably might have cut. But, whatever may be the extent of that power, it is a power veſted in truſtees; and it is a new argument, that becauſe powers larger in terms are given to truſtees, it neceſſarily follows, that perſons, who are not truſtees, are to have rights as extenſive, though given in leſs liberal terms. The principal object of the truſt was to make the eſtate of Lord and Lady *Downſhire* exonerate the inheritance from thoſe debts. I am very far from being ſure, that this Court would allow them unneceſſarily to execute their powers, even when the right to exerciſe them ariſes, otherwiſe than this Court thinks a provident execution, and far from admitting, that it would be in the breaſt of the truſtees at the inſtance of the plaintiff to cut ornamental timber and leave the other. The Court would, I think, direct them to cut that, which was not ornamental. But there is more in this; for it is abſolutely in the diſcretion of the truſtees as to the times and manner of cutting. They ſtand between the takers of the inheritance and the tenants for life. I do not ſay, if a provident and huſband-like mode of treating the eſtate was propoſed, they would not have a right to call upon the truſtees: but the Court would at leaſt hear them upon the point, whether they were diſcreetly called upon under this contract; and it would be very ſtrong to ſay, that, becauſe theſe truſtees, to accelerate the payment, have this large power after the death of the defendant, therefore ſhe has the ſame power in her life, to whoſe diſcretion that power is not entruſted. The queſtion reſults to this; whether I am reaſonably ſure, that, becauſe this power is given to the truſtees after the death of the defendant, the parties, uſing language with reſpect to her power, which has now by authority had this reſtrictive ſenſe put upon it, meant all, which in clear and ample language they have deſcribed in the powers given after her death. I cannot ſo enlarge the expreſſion as to the power given to the defendant; and therefore I cannot vary the injunction upon this ſpecial ground.

Motion refuſed.

June 3.

Ex parte BENNET.

Ex parte DOLMAN.

Under the ſtatute 40 *Geo.* 3. *c.* 56. authoriſing payment of money, to be laid out in land to be ſettled, to the tenant in tail, the order was thus qualified; in caſe he ſhould be living on the ſecond day of the enſuing Term; and an inquiry as to incumbrances was directed.

THESE petitions were preſented under the late act of Parliament (*a*), authoriſing the Court to order money, in truſt to be laid out in land to be ſettled, to be paid to the perſon, who as tenant in tail of the land could bar the remainders by a recovery.

Lord CHANCELLOR referred to, and adopted, the conſtruction put upon the ſtatute by Lord *Roſslyn* in *Lowton* v. *Lowton* (*b*), to prevent the party from getting the money, unleſs he ſhould be living on the ſecond day of the enſuing Term.

In the ſecond petition the prayer was for an abſolute transfer of Bank Annuities ariſing from the ſale of eſtates, of which the petitioner was tenant in tail, with remainders over; which had been ſold under an act of Parliament, directing the money produced by the ſale to be inveſted in other lands, to be ſettled to the ſame uſes.

Upon the 3d of *March* Lord *Alvanley*, then Maſter of the Rolls, made an order, directing an inquiry, whether there were any incumbrances affecting the reſidue of the Bank Annuities; and declaring, that in caſe the Maſter ſhould find, that there were no incumbrances, the petitioner would be entitled to a transfer: but

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(*a*) Stat. 40 *Geo.* 3. *c.* 56.

(*b*) *Ante*, vol. 5. 12. note (*a*).

that this order as to the petitioner ſhould not take effect, or be of any force, unleſs the petitioner ſhould be living on the ſecond day of *Eaſter* Term then next.

The petition coming on upon the Report, that there were no incumbrances, the Lord Chancellor declared his approbation of that inquiry.

Orders were made upon both petitions accordingly.

RIGBY *v.* M'NAMARA.

June 5th

Biddings opened in favour of a perſon, who was preſent at the ſale.

MR. *Trower* had moved to open the biddings of a lot, which had been bought before the Maſter for 1000*l.*, upon an advance of 300*l.*; and offered to pay in half of the money.

Mr. *Piggott* for the purchaſer oppoſed the motion, on the ground, that the perſon making this offer had been preſent at the ſale.

Lord CHANCELLOR inclined to diſcourage a perſon, preſent at the ſale, and lying by, ſpeculating upon the event; and afterwards coming forward with an advance: but Mr. *Trower* obſerving, that there was only one caſe (*a*), before Lord *Roſslyn*, in which this objection had prevailed, and the diſtinction upon that was, that the perſon coming to open the bidding, having been preſent at the ſale, was a party in the cauſe, it ſtood over.

The motion being renewed, and the party offering 400*l.* advance and to pay in 700*l.*, the Lord Chancellor ſaid, he had mentioned that caſe to Lord *Roſslyn*; who did not conſider himſelf as laying that down as a general rule; and what is now offered would have abundantly ſatisfied him.

The order was made on paying in 700*l.* and paying the purchaſer all coſts and expences.

(*a*) *Semner* v. *Charlton*, cited in *Tait* v. *Lord Northwick*, *ante*, vol. 5. 655.

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June 5, 6.

CHALLNOR *v.* MURHALL.

The Court cannot diſpenſe with a prerogative adminiſtration.

An order had been made in this cauſe upon a bill by creditors, that the reſidue of money to ariſe by a ſale of eſtates of the teſtator, which had been directed, ſhould be applied in payment to the ſeveral creditors named in the Report, or to the perſonal repreſentatives of ſuch of them as were or might be dead, of what had been, or ſhould be, reported due. The Report ſtated, that the ſeveral ſums mentioned were due to the ſeveral creditors, or the perſonal repreſentatives of ſuch as were dead.

Mr. *Pemberton* moved, that the Maſter might alter his report by inſerting in the ſchedule the names of the perſonal repreſentatives of the creditors, who were dead, from the provincial adminiſtration, granted to ſuch perſonal repreſentatives.

The object of the motion was, that the prerogative adminiſtration might be diſpenſed with: the ſums being ſmall; and it was ſaid the practice of late had been ſo.

Lord Chancellor—Upon what principle does the practice proceed? If thoſe perſons are the proper repreſentatives, the Maſter ſhould have done it without a ſpecial authority: if they are not, I will not direct him to annex the names of perſons, who are not the repreſentatives. I have no objection to order him to annex the names of the perſonal repreſentatives of ſuch creditors as are dead.

June 6.

The order was ſo made; which, it was ſaid, would anſwer the purpoſe: but the next day the motion was repeated; Mr. *Pemberton* obſerving, that the order, as it ſtood, might be a ſurpriſe on the Maſter and the Court; and referring to *Sweet* v. *Partridge* (*a*); and *Upton* v. *Lord Ferrers* (*b*). In the latter ſeveral ſmall ſums were reported due to a number of creditors; who had obtained provincial adminiſtration; and upon an application, that the whole

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(*a*) *Ante*, vol. 5. 148.

(*b*) At the Rolls, *Feb.* 23. *March* 2. 4. 1801.

amount of their debts might be paid to the Solicitor, who was one of the executors of the debtor, he undertaking to diſtribute, it was ſo ordered. Another caſe was mentioned, which was firſt before Lord *Alvanley*, when Maſter of the Rolls; who wiſhed to conſult the Lord Chancellor; and the order was made by his Lordſhip at the Seal after laſt *Hilary* Term. The Lord Chancellor applied to the Bar; and it was ſaid, the practice had been eſtabliſhed to the extent of the ſum of 40*l.*: but Lord *Thurlow* being deſired to go beyond that ſum refuſed to diſpenſe with the prerogative adminiſtration, wherever it was neceſſary from the circumſtances. It was alſo ſaid, that in *Upton* v. *Lord Ferrers*, the receiver made the diſtribution at his peril: there was no indemnity.

Lord CHANCELLOR—Upon what ground can the Court diſpenſe with the proper adminiſtration? Suppoſe, in *Upton* v. *Lord Ferrers* after the diſtribution it turned out, that the effects were more than had been expected by the recovery of a debt ſuppoſed to be bad, and a prerogative adminiſtration had been taken out: would not an action lie by that adminiſtrator againſt the perſon who had received the money? Is the Court to make an order directly in oppoſition to the law? Where am I to ſtop? It may be ſaid hereafter, that a provincial adminiſtration is too great an expence; and therefore the money ought to be paid to the next of kin without any adminiſtration.

The order was not made.

Ex parte RUFFIN.

June 6.

A fair diſſolution of partnerſhip between two: one retiring; and aſſigning the partnerſhip property to the other; and taking a bond for the value and a covenant of indemnity againſt the debts: the other continued the trade ſeparately a year and a half; and then became a bankrupt. The Lord Chancellor was of opinion, the joint creditors had no equity attaching upon partnerſhip effects remaining in ſpecie; and at all events ſuch a claim ought to be by a bill, not a petition.

IN *June* 1797 *Thomas Cooper* of *Epſom*, brewer, took *James Cooper* into partnerſhip. That partnerſhip was diſſolved by articles, dated the 3d of *November* 1798; under which the buildings, premiſes, ſtock in trade, debts, and effects, were aſſigned to

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James Cooper by *Thomas Cooper*; who retired from the trade. Upon the 2d of *April* 1800 a commiſſion of bankruptcy iſſued againſt *James Cooper*; under which the joint creditors attempted to prove their debts; but the Commiſſioners refuſed to permit them; upon which a petition was preſented to Lord *Roſlyn*; who made an order, that the joint creditors ſhould be at liberty to prove; with the uſual directions for keeping diſtinct accounts, and an application of the joint eſtate to the joint debts, and of the ſeparate eſtate to the ſeparate debts. At a meeting for the purpoſe of declaring a dividend the Commiſſioners poſtponed the dividend, in order to give an opportunity of applying to the Lord Chancellor; in conſequence of which this petition was preſented; praying, that the partnerſhip effects remaining in ſpecie, and poſſeſſed by the aſſignees, may be ſold; and that the outſtanding debts may be accounted joint eſtate.

By the articles of diſſolution the parties covenanted to abide by a valuation to be made of the partnerſhip property; and *James Cooper* covenanted to pay the partnerſhip debts then due, and to indemnify *Thomas Cooper* againſt them; and *Thomas Cooper* covenanted not to carry on the trade of a brewer for 20 years within 20 miles of *Epſom*. A bond for 3000*l.*, the calculated value of the partnerſhip property aſſigned, was given to *Thomas Cooper* by *James Cooper* and his father, as ſurety. In purſuance of the covenant the partnerſhip property, conſiſting of leaſes, the premiſes, where the trade had been carried on, ſtock, implements, outſtanding debts, and other effects, were valued by arbitrators at 2030*l.* after charging all the partnerſhip debts then due. *James Cooper* by his affidavit ſtated, that all the joint creditors knew of the diſſolution and the aſſignment of the property; that advertiſements were publiſhed; and the deponent after the diſſolution received many debts due to the partnerſhip; but paid more on account of the partnerſhip. His father by affidavit ſtated, that he paid the intereſt of the bond regularly; and intended to pay the principal, when due.

Mr. Romilly and Mr. Cullen for the joint creditors, and Mr. Bell for Thomas Cooper—If one partner can by aſſigning all his intereſt in the effects prevent the joint creditors from going againſt thoſe effects, fraud muſt be the conſequence. The partners may agree to divide the effects, and carry on buſineſs ſeparately. By this agreement between the partners the whole fund of the joint creditors is taken away. Upon the principles, upon which the effects, joint at the date of the bankruptcy, are applied to the joint debts, effects, joint at the diſſolution of the partnerſhip, and remaining the ſame in ſpecie at the time the commiſſion iſſues, ſhould be conſidered joint property. The ground is, that credit has been given upon the faith of the joint property; and it is a fraud upon the perſons giving that credit to apply that fund to the ſeparate creditors, truſting only to the individual and to the ſeparate effects; and that ground applies equally to this caſe. Until the partnerſhip accounts are taken, there is no ſeparate property but in the ſurplus after paying the partnerſhip debts (*a*): the creditors ſtanding in the place of the bankrupt. The joint creditors therefore have a mediate, if not a direct, lien upon the whole of the partnerſhip effects. At law the partnerſhip creditors have more advantage than under a commiſſion; taking the partnerſhip effects excluſively, and the ſeparate effects with the ſeparate creditors. What difference ariſes from the circumſtance, that the partnerſhip did not exiſt at the time of the bankruptcy? That is not ſufficient to take the caſe out of the common rule. In *Weſt* v. *Skip* (*b*) it is laid down, that upon a diſſolution by agreement or by time the partner out of poſſeſſion is not diveſted of his property in and lien upon the partnerſhip effects. The ſame right remains to an account of the partnerſhip effects; in which the firſt item always is the payment of the partnerſhip debts. The poſition, that partners can as between themſelves by any act or agreement alter the partnerſhip ſtock, ſo as to affect the rights of third perſons, cannot be maintained. Why have they not an equal right in the ſame manner to diſcharge their perſons by ſuch act or agreement; eſpecially, if with the knowledge of the joint creditors: but *Heath* v. *Percival* (*c*) ſhews, that circumſtance will not bind them; the tranſaction being *res inter alios acta*. That an actual aſſignment and diveſting partnerſhip property out of one partner will not defeat the right againſt the partnerſhip effects, is proved by *ex parte Barnaby* (*d*). No evidence is produced to ſhew, that the ſeparate creditors

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(*a*) *Taylor* v. *Fields*, *ante*, vol. 4. 396.

(*b*) 1 *Veſ.* 239. 456.

(*c*) 1 *P. Will.* 682.

(*d*) 1 *Cooke's Bank. Law*, 253. ed. 4.

thought, this was ſeparate property; and gave credit accordingly: it muſt therefore be taken, that they knew, it was not. The aſſignment is made upon condition, and ſubject to the payment of the partnerſhip debts. A conſiderable part of the property conſiſted of debts; which are not aſſignable.

But this queſtion has been decided by the order made by the late Lord Chancellor.

Mr. Manſfield and Mr. Cooke for the aſſignees—No ſuch attempt was ever made before under ſuch circumſtances: a fair diſſolution; and an aſſignment by one partner of all the effects to the other; and trade carried on by that other; and at this diſtance of time. Upon the petition before the late Lord Chancellor there was no debate; and the ſeparate creditors not appearing, and *Thomas Cooper* conſenting, the uſual order was made. The circumſtance, that part of the property conſiſted of debts, makes no difference. *Thomas Cooper* is a ſolvent partner, endeavouring to get what he can through the medium of the joint creditors. It is perfectly immaterial to them; for he is ſolvent; and able to pay them. The petition is in truth his. If this was not a complete aſſignment, it will be impoſſible to draw the line. Why may not joint creditors as well at the end of 20 years fix upon a houſe or any ſpecific article, once partnerſhip property? Certainly fraud will vitiate tranſactions of all ſorts: but this would be a ſingular fraud; for if the bankruptcy does not follow ſoon enough to prevent the joint creditors from enforcing their remedy at law, the object cannot be attained; and it is only in bankruptcy that the queſtion can ever ariſe; for at law the joint creditor takes joint as well as ſeparate property; and the diſtribution takes place in bankruptcy only. The object of ſuch a plan muſt be to ſerve the ſeparate creditors, not the partners themſelves; and the bankruptcy muſt follow ſo immediately as to prevent the creditors from purſuing their remedies at law. There is no pretence of fraud. The conſideration was a bond; but the queſtion is preciſely the ſame, as if it was paid in money. The trade was carried on a year and a half; and there is nothing to ſhew, that any one looked on *Thomas* as a partner. The effect would be, that, until all the joint debts are paid, there never could be a complete aſſignment from one partner to another. Conſider, how ſeparate creditors may be defrauded, giving credit to what they ſee as ſeparate property. Caſes infinitely ſtronger occur in daily practice; as the caſe of *Shakeſhaft*, *Stirrup*, and *Saliſbury*. One of three partners by arrangement between them happens in the courſe of trade, he living in *London*, and the others in the country, to get into his poſſeſſion a quantity of goods. A commiſſion of bankruptcy iſſued. Lord *Thurlow* ſaid, he could not take accounts between the reſpective partners: but finding the effects in the hands of one, whatever might be the demands of the others, or the conſequences to the joint creditors, the goods were the ſeparate property of that one; and muſt be applied to his ſeparate debts. There it happened by accident, that a conſiderable part of the partnerſhip ſtock was transferred to one of the partners: not by an actual aſſignment for conſideration, as in this inſtance; which is in effect a purchaſe. There is no ſound diſtinction between this tranſaction and the ſale of partnerſhip effects to any other perſon, a ſtranger. After the aſſignment *Thomas Cooper*, in whoſe right the petitioners claim, had no intereſt whatſoever. None of the caſes cited apply. The joint creditors have no lien; though in the arrangement in bankruptcy the joint effects are applied to the joint debts. The doctrine of *Weſt* v. *Skip* is not diſputed; that a partner put out of poſſeſſion, whether by agreement or effluxion of time, does not loſe his right: what were partnerſhip effects at that time ſtill remain ſo: but Lord *Hardwicke* never ſaid, that notwithſtanding a ſale of the partnerſhip effects, and a ſeparate trade carried on with them for years afterwards by the perſon who bought them, they remain joint. The agreement of partners can neither diſcharge goods nor the perſon: but it may change the property in the goods. *Heath* v. *Percival* has not the leaſt relation to this caſe. There was no agreement to give up the joint bond. The party therefore had a right to enforce it, notwithſtanding his giving time to Sir *Stephen Evans*. In *ex parte Burnaby* it does not appear, that any one of the partners had gone out; nor, when *Criſpe* committed the act of bankruptcy; which might have been prior to the aſſignment. That aſſignment was merely of the ſhare of one to the other, not attended with any diſſolution of the partnerſhip; which in this caſe was actually diſſolved; and the ſhare legally aſſigned. The partnerſhip ſubſiſting up to that time, there was a right to inſiſt, that the partnerſhip debts ſhould be paid.

With reſpect to the lien, in the caſe of *Lodge* and *Fendal*, to which your Lordſhip has referred, Dr. *Fendal* had paid 10,000*l.* into a banker's hands; and immediately afterwards *Lodge* ſtopped payment. The utmoſt contended for there was, that the aſſignees of the ſeparate eſtate might be at liberty to prove that ſum, not to take it out. Lord *Thurlow* there eſtabliſhed the rule, that, unleſs there was a tranſmutation of the eſtate by fraud, the creditors muſt take it, as it happened at the time of the bankruptcy. That rule has been ſince acted upon in other caſes, and the law is eſtabliſhed, that the date of the act of bankruptcy is the commencement of the lien; and until then there is no lien. At law there is no lien upon the effects of the debtor, until the execution is delivered to the ſheriff. At the date of this deed there was neither act of bankruptcy nor execution. There being no lien therefore at law, what objection is there to this deed, public, attended with poſſeſſion, and upon *bona fide* conſideration? The intent of the deed was to convey all the property to *James Cooper*. He was to uſe his capital in the continuing trade. For that purpoſe the aſſignment was neceſſary. It is not neceſſary in ſuch a caſe to prove, that the ſeparate creditors truſted to the apparent ſeparate ſtock. To what elſe could they truſt? *James Cooper* ſwears, no idea was entertained of his having any partnerſhip property; that he contracted debts to the amount of 5000*l.*; and that he laid out conſiderable ſums upon this very property; and that he paid partnerſhip debts to the whole amount of what he received. But the caſe is not to be decided upon ſuch circumſtances, but on the legal right of the creditors. The joint property was liable to their execution, but in common with any other property. But ſuppoſe, a ſeparate creditor had obtained a prior judgment and execution: could that have been ſuperſeded by the ſubſequent execution of a joint creditor?

In *Hankey* v. *Garret* (*a*), alſo referred to by your Lordſhip, the queſtion was the ſame as in *ex parte Burnaby*; whether under the ſeparate bankruptcy there was a right to diſtribute the joint property among the joint creditors: Lord *Thurlow*'s doubt being, whether the ſolvent partner had not a right to appear. That doubt has been of late got over: the Court having been in the

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(*a*) *Ante*, vol. 1. 236.

habit of diſpoſing of joint property under a ſeparate commiſſion without a bill, or the appearance of the other partner. But in thoſe caſes the queſtion was not, what is or is not joint property; but as to the juriſdiction.

Mr. Romilly in reply—Though this order was not made by Lord *Roſslyn* upon argument, it certainly did not paſs as a mere matter of courſe. This muſt be decided as a general caſe. There is one very important fact; that there were outſtanding debts to a very conſiderable amount. None of thoſe debts could be collected but by action in the joint names of the two partners until the bankruptcy, and now, of the aſſignees. The effect therefore was not to make *James Cooper* the legal owner: an equitable intereſt only could be transferred, ſubject to all equities, and therefore to the equitable lien upon the covenant to pay all the debts; to which theſe outſtanding debts, as well as the other property, were liable. The joint creditors claim, not by way of lien, but as having by the rules eſtabliſhed in this Court an equitable claim upon the joint property, in preference to the ſeparate creditors, until the former are paid 20*s.* in the pound. There is an analogy to the caſe of a partner dying; in which caſe all ſurvives at law to the other: but this Court either in a ſuit or in bankruptcy would direct an account of all the debts at the diſſolution. So, where an executor becomes bankrupt: all the effects would belong to the aſſignees: but the Court conſiders them truſtees; as he was. So in this caſe the bankrupt was a truſtee for the joint creditors after the diſſolution of the partnerſhip; as both were before. The caſe of *Lodge* and *Fendal* is materially diſtinguiſhable. In this the whole fund of the joint creditors is done away. In that alſo the queſtion was not as to ſpecific effects, but a ſum of money paid in by one partner. Theſe petitioners only ſay, theſe ſpecific effects ſubſiſting in the hands of this partner ought to be applied. *Ex parte Burnaby* is an expreſs deciſion upon the point. The ground of this claim is upon the aſſignment, not the diſſolution; which is immaterial: but how can one partner aſſign all his property to the other without a diſſolution? As to the fraud, ſuppoſe, the perſon going out is inſolvent: a caſe extremely likely to happen.

1801. Ex parte RUFFIN.

Lord CHANCELLOR—This caſe is admitted, unleſs *ex parte Burnaby* applies to it, to be new in its circumſtances. Therefore, if I was of opinion, that the petition could be ſupported, I ſhould be very unwilling to expreſs that in bankruptcy; where my opinion would not be ſubject to review. If the caſe I have mentioned has decided the point, there is the authority of Lord *Hardwicke* upon it; which would weigh down the moſt conſiderable doubt, that I could be diſpoſed to entertain. I feel great difficulty in complying with the prayer of the petition; and, when I read it, was ſtruck with it, as a new caſe; and as one, upon which I do not clearly ſee my way to the relief prayed. It is the caſe of two partners; who owed ſeveral joint debts; and had joint effects. Under theſe circumſtances their creditors, who had a demand upon them in reſpect of thoſe debts, had clearly no lien whatſoever upon the partnerſhip effects. They had power of ſuing, and by proceſs creating a demand, that would directly attach upon the partnerſhip effects. But they had no lien upon or intereſt in them in point of law or equity. If any creditor had brought an action, the action would be joint: his execution might be either joint or ſeveral. He might have taken in execution both joint and ſeparate effects. It is alſo true, that the ſeparate creditors of each by bringing actions might acquire a certain intereſt even in the partnerſhip effects; taking them in execution in the way, in which ſeparate creditors can affect ſuch property. But there was no lien in either. The partnerſhip might diſſolve in various ways: firſt by death: 2dly, by the act of the parties: that act extending to nothing more than mere diſſolution; without any ſpecial agreement as to the diſpoſition of the property, the ſatisfaction of the debts, much leſs any agreement for an aſſignment from either of the partners to the others. The partnerſhip might alſo be diſſolved by the bankruptcy of one or of both, and by effluxion of time. If it diſſolved by death, referring to the law of merchants and the well known doctrine of this Court, the death being the act of God, the legal title in ſome reſpects, in all the equitable title, would remain notwithſtanding the ſurvivorſhip; and the executor would have a right to inſiſt, that the property ſhould be applied to the partnerſhip debts. I do not know, that the partnerſhip creditors would have that right; ſuppoſing, both remained ſolvent. So, upon the bankruptcy of one of them there would be an equity to ſay, the aſſignees ſtand in the place of the bankrupt; and can

take

take no more than he could; and conſequently nothing, until the partnerſhip debts are paid. So, upon a mere diſſolution, without a ſpecial agreement, or a diſſolution by effluxion of time: to wind up the accounts the debts muſt be paid; and the ſurplus be diſtributed in proportion to the different intereſts. In all theſe ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnerſhip debts. The joint creditors muſt of neceſſity be paid in order to the adminiſtration of juſtice to the partners themſelves. When the bankruptcy of both takes place, it puts an end to the partnerſhip certainly: but ſtill it is very poſſible, and it often happens in fact, that the partners may have different intereſts in the ſurplus; and out of that a neceſſity ariſes, that the partnerſhip debts muſt be paid: otherwiſe the ſurplus cannot be diſtributed according to equity, and no diſtinction has been made with reference to their intereſts, whether in different proportions, or equally. Many caſes have occurred upon the diſtribution between the ſeparate and joint eſtates; and the principle in all of them, from the great caſe of Mr. *Fordyce* (*a*), has been, that if the Court ſhould ſay, that what has ever been joint or ſeparate property ſhall always remain ſo, the conſequence would be, that no partnerſhip could ever arrange their affairs. Therefore a *bona fide* tranſmutation of the property is underſtood to be the act of men acting fairly, winding up the concern; and binds the creditors; and therefore the Court always lets the arrangement be, as they ſtand, not at the time of the commiſſion, but of the act of bankruptcy.

Thomas Cooper is admitted to be ſolvent. He certainly has no ſuch equity, as if the partnerſhip had been diſſolved by bankruptcy, death, effluxion of time, or any other circumſtance, not his own act. But he diſſolves the partnerſhip a year and a half ago; and, inſtead of calling upon theſe effects according to his equity at the diſſolution to pay the partnerſhip debts, he aſſigns his intereſt to the other, to deal as he thinks fit with the property, to act with the world reſpecting it; deſiring only a bond to pay a given value in three or four years. Therefore he or his executors could not ſue. If it was neceſſary for the creditors to operate their relief through his equity, he has no equity. It is then ſaid,

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(*a*) *Harman* v. *Fiſher*, *Cowp*. 117.

Debts are within the ſtatute 21 *Jam.* 1. *c.* 19. *ſ.* 10, 11.

and the circumſtance had ſtruck me, that all the property is not aſſignable at law; for inſtance the debts: but as between the two *Coopers* they were the property of the bankrupt; for debts are within the ſtatute of King *James* (*a*); and if left in the order and diſpoſal of the bankrupt, he is proprietor of the debt. Therefore *Thomas Cooper* could never ſet up the inſufficiency of the legal operation of the aſſignment againſt his own deed. The aſſignment was not made ſubject to the payment of the debts, but in conſideration of a covenant, leaving no duty upon the property, but attaching a perſonal obligation upon the aſſignee to pay the debts. The creditors therefore cannot reſt upon the equity of the partner going out. I was ſtruck with the argument of inconvenience: the inconvenience on all ſides is great. To ſay this ſeems to me a monſtrous propoſition: that, which at any time during the partnerſhip has been part of the partnerſhip effects, ſhall in all future time remain part of the partnerſhip effects; notwithſtanding a *bona fide* act. Suppoſe, an improbable caſe, that the partners in *Child*'s houſe choſe to ſhift their ſhop from *Temple Bar* to the weſt end of the town; and that houſe, now the property of the partnerſhip, was *bonâ fide* bought by one of the partners; and the money was inveſted in the purchaſe of the new houſe; in which they were going to reſide: ſuppoſe, a ſtill more improbable caſe, that a year and a half or ten years afterwards they became bankrupt: would that houſe be part of the partnerſhip effects? It would be ſo, if it remained without the legal intereſt being paſſed, or without any equitable claim, taking it out of the reach of a legal execution: but where the effect is a *bona fide* tranſaction of this ſort, if it were held at any time afterwards to be partnerſhip property, not for the purpoſe of ſatisfying demands of the partners, or of any creditor, who cannot otherwiſe be ſatisfied, but to enable them to undo all the intermediate equities, commercial tranſactions could not go on at all. It would be much leſs inconvenient to examine the *bonâ fides* of each tranſaction than to ſay, ſuch tranſactions ſhall never take place.

The caſe of *Weſt* v. *Skip* falls within ſome of the obſervations I have made. *Heath* v. *Percival* does not apply at all. The bond in that caſe was not given up; and therefore the creditor keeping the

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(*a*) Stat. 21 *Jam.* 1. *c.* 19. *ſ.* 10, 11.

the beſt ſecurity, and refuſing to part with it, no inference can be made againſt the concluſion ariſing from that. *Hankey* v. *Garret* is alſo very different. There the partnerſhip was diſſolved by bankruptcy or by death; and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any obſervation upon *Burnaby*'s caſe. I do not know how to underſtand it. Whether there was any thing ſpecial in the aſſignment, I cannot find out from the report. I ſhall endeavour to find the papers. It looks very like this caſe; if it is in ſpecie this caſe, as an authority I ſhould think myſelf bound to ſubmit to it. But if it is not in ſpecie this caſe, there is ſo much doubt, whether this relief can be given, that I am ſatisfied, it ought to be given, if at all, in a juriſdiction, where my opinion would be ſubject to review. My preſent inclination is, that the creditors have not this equity. I have conſiderable doubt alſo, whether, if they have it, *Thomas Cooper* would be benefited by it; and a farther ſubject of grave and ſerious doubt is, whether, if the joint creditors diſturb the arrangement, the ſeparate creditors would not have a right to ſet the arrangement right at his expence.

I now think, there is a circumſtance, that diſtinguiſhes *Burnaby*'s caſe. The aſſignment was not by one to the other two, but by one to one of the other two; which may be very different. I think, that circumſtance diſtinguiſhes the caſe ſo much, that I ſhall conſult the intereſt of the parties better by ſaying, they may file a bill, if they think proper, than by farther delay.

Petition diſmiſſed.

WHITMORE *v.* TRELAWNY.

June 9.

General words controlled, in order to make the whole will conſiſtent. Survivorſhip by words in a will creating a joint intereſt: the intention of ſeverance not being ſufficiently clear.

OWEN SALUSBURY BRERETON by his will, dated the 15th of *December* 1795, gave and deviſed all his lands, tenements and hereditaments, in *Cheſhire*, *Cheſter*, *Flintſhire*, *Denbighſhire*, and *Middleſex*, to the plaintiff and *Charles Potts*, their heirs and aſſigns; in truſt to and for the uſe of the teſtator's wife during her life; and after her deceaſe he deviſed all the ſaid lands, &c. in *Cheſhire* and *Cheſter* and *Middleſex*, in truſt to the ſame truſtees, to and for the uſe and benefit of *Charles Trelawny* during his natural life; remainder to his eldeſt and every other ſon in tail male; remainder to his heirs for ever. He deviſed to the ſame truſtees his lands, &c. in *Flintſhire* and *Denbighſhire*, for the uſe of *William Trelawny* for life; remainder to the next and every other ſon in ſucceſſion of Sir *Harry Trelawny* in tail male; remainder to his, the ſaid *William Trelawny*'s, heirs for ever. The will directed the deviſees to take the name of *Brereton*; and after ſeveral other diſpoſitions proceeded thus:

"I give to my dear wife the intereſt of all my 3 *per cent.* con-
"ſolidated ſtock at the Bank during her natural life (except of
"what I hereinafter bequeath) with power by her laſt will to
"deviſe 5,000 *l.* conſols between her and my nieces. After my
"wife's deceaſe I give two-thirds of the above intereſt of the con-
"ſols to General *Trelawny*, and his brother *Thomas* of *Odiam*,
"Eſq. for their lives; and after their deaths I give the ſame to
"the two perſons in poſſeſſion of my ſaid ſeveral land eſtates."

The teſtator then gave his wife ſeveral ſpecific legacies of his ſaid Bank 3 *per cent.* annuities, amounting in the whole to 8,000 *l.* of ſuch annuities; and he appointed his wife and the plaintiff executors; and made his wife reſiduary legatee.

The teſtator died ſoon after the execution of his will. After paying the legacies the fund of 3 *per cent.* conſolidated Bank annuities was reduced from 30,000 *l.* to 22,000 *l.* The widow received the dividends until her death in *May* 1800. By her will, dated the 11th of *January* 1800, after giving ſpecific legacies to a large amount of 3 *per cent.* conſolidated Bank annuities and other legacies, and in part reciting the will of her huſband, and ſtating the power given to her by that will, ſhe therefore did in purſuance of ſuch power veſted in her by her ſaid late huſband's will deviſe and bequeath the ſaid ſum of 5,000 *l.* conſols in manner following. She then directed 2,500 *l.*, one moiety of the ſaid ſum, to be divided between four nieces; and as to the other 2,500 *l.* ſhe willed, deviſed and bequeathed, the ſame to ſix other nieces: *viz.* 2,400 *l.* among five, and 100 *l.* to another; and ſhe gave the reſidue of the money in the funds not therein diſpoſed of and the remainder of her eſtate and effects of what nature and kind ſoever ſhe gave to the plaintiff; and appointed him executor.

After the deaths of the teſtatrix and of General *Harry Trelawny* the bill was filed; ſtating, that the 5,000 *l.* ought to be taken by the plaintiff, as executor of the widow, out of the 22,000 *l.* ſtock; and that after that deduction two-thirds of the reſidue ought to be appropriated and applied between *Thomas Trelawny* and the perſons, who ſhall ſucceſſively become entitled to the teſtator's real eſtates; and praying, that the rights of the parties may be aſcertained.

The defendants by their anſwers ſubmitted, whether the 5,000 *l.* ſtock ought to be taken out of the 22,000 *l.* and two-thirds of the remaining 17,000 *l.* only to be applied for the benefit of the defendants, according to the ſuggeſtion of the bill; or, whether the 5,000 *l.* was not to be taken out of the general reſidue.

The defendants *Charles Trelawny Brereton* and *William Trelawny Brereton* farther ſubmitted, whether the defendant *Thomas Trelawny* did or did not upon the death of General *Harry Trelawny* become entitled to receive all the dividends and intereſt of the two-third parts of the reſidue of the 3 *per cent.* annuities for life; or, whether upon the death of General *Trelawny* a moiety of the two-thirds of the dividends, *&c.* to which he was entitled for life, did not immediately become veſted in the defendant *Charles Trelawny Brereton* and *William Trelawny Brereton.* The defendant *Thomas Trelawny* claimed the whole of the two-thirds of the dividends by ſurvivorſhip.

The Solicitor-General and Mr. Hart for the plaintiff—The ſum of 5,000 *l.* 3 *per cent.* Bank annuities was a ſpecific bequeſt for the benefit of the nieces of the teſtator and his wife; and her authority extended no farther than to apportion that ſum. As to that only a diſcretion was to be exerciſed: but the nieces took ſubſtantial intereſts under his will. Therefore the intereſt given to General *Trelawny* and his brother was in nature of a ſpecific bequeſt of the reſidue. The conſtruction, that the 5,000 *l.* is to come out of the aggregate fund, is the rational conſtruction.

Mr. Richards and Mr. Grimwood for the defendant Thomas Trelawny—Upon the general queſtion this defendant agrees with the other defendants againſt the plaintiff; but contends, that this is a joint bequeſt to the two perſons in remainder: the other defendants inſiſting, it is ſeveral. Upon the firſt queſtion, it is upon them to ſhew, that theſe words "the above intereſt," importing by reference to the former words the intereſt of all the conſols, mean only a part of them. The deciſion of *Brown* v. *Higgs* (*a*), as it now ſtands, is an authority, that the words of the power operate as a bequeſt to the nieces: but that caſe is a ſubject of appeal. Upon the defendant's conſtruction every part of the will has effect without abſurdity: upon the other words muſt be ſupplied.

With reſpect to the queſtion between the defendants, this is a joint bequeſt plainly; and therefore ſurvives.

Mr. Stanley for the defendants *Charles Trelawny Brereton* and *William Trelawny Brereton* upon the firſt queſtion concurred with the other defendants. Upon the point between the defendants he contended from the manner, in which the real eſtate was diſpoſed of, that the teſtator did not mean ſurvivorſhip as to the money fund; and that upon the whole will there was an intention of ſeverance as to that.

The Solicitor General in reply—The conſtruction, that the whole intereſt without any deduction in any ſhape is intended, is impoſſible. A different modification of the intereſt is diſtinctly introduced; ſhewing a diminution of the fund by the previous diſpoſition of the 5,000*l*. The power is only to apportion; and preſumes the thing given, before that power commences.

Lord Chancellor—It is impoſſible in the conſtruction of ſuch a will as this to be quite ſure, I am right in the opinion I have formed; and yet I confeſs an inclination of opinion, riſing almoſt to confidence, that the claims of the defendants muſt be reſtrained to two thirds of the dividends of 17,000*l*. Bank annuities only, and not of 22,000*l*. The teſtator had at the date of the

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(*a*) *Ante*, vol. 4. 708. vol. 5. 495. *Poſt*.

will about 30,000*l.* 3 *per cent.* conſolidated Bank annuities: but in conſtruing a will the Court muſt conſider, what would be the conſtruction in all the given changes of property, that might have taken place between the date of the will and the death of the teſtator; and though in this inſtance there was no ſuch change, regard muſt be had to what would have been the conſtruction, if the ſtate of the property had been changed by act in his life. Upon the clauſe reſpecting the 5,000*l.* it is contended, that there was a mere power to the teſtator's wife, independent of the exerciſe of which power the nieces would take nothing. On the other hand it was inſiſted, that there was a veſted intereſt in the nieces; the proportions to be regulated by the exerciſe of that power upon the property; to go equally among them, if the power ſhould not be exerciſed. In my view of this caſe it is not neceſſary to ſay, what is the true effect of the will upon that point; and I am happy to deliver myſelf from the neceſſity of conſidering upon this day the authority of that caſe, which is to come before me by appeal; for, taking this either as a power, or as a veſted intereſt, my mind comes to the ſame concluſion. If it was a power, and was executed by the wife, it is clear, under the execution of the power the nieces would take the 5,000*l.* at the death of the wife. If an intereſt veſted in them independent of the execution of the power, it is equally clear, they would take it at the death of the wife. From that ſum of 5,000*l.* therefore it is impoſſible, that the defendants could have either two thirds of the intereſt or any other part. That ſum therefore being to be ſubtracted from the bulk of this fund, the teſtator goes on to make the diſpoſition of two thirds of the above intereſt of the Conſols after his wife's deceaſe; which words may undoubtedly mean, and more naturally mean in ordinary language, all the Conſols than a part. But terms ſo inaccurate as theſe muſt be conſtrued not merely with regard to their ordinary meaning: but that conſtruction muſt be adopted, that will make the whole will conſiſtent and capable of being executed; and in that view the queſtion is, whether the teſtator meant two thirds of that, of which he had not before diſpoſed, or of 22,000*l.*, having left to diſpoſe of only 17,000*l.*

But there may be another view of this caſe. Suppoſe, the teſtator's wife had died in his life. In that caſe the nieces take their intereſts at his own deceaſe. He had authoriſed 5,000*l.* to be ſub-

1801.

Whitmore *v.* Trelawny.

tracted from the bulk of the fund for their benefit; and if that was ſubtracted at his death, it is utterly impoſſible, that under the ſubſequent words the defendants could receive more than two thirds of what remained. But a much ſtronger caſe might be put. Suppoſe, he had in his life ſold 25,000*l.* of the ſtock: upon the conſtruction of the defendants this conſequence would follow; that, though the wife might have given 5,000*l.* by the execution of the power, or the teſtator had given that ſum independent of the power, to the nieces, the defendants might have received two thirds of the dividends of the remaining 5,000*l.* It is impoſſible he could have meant that; and if not, the conſequence follows, that under the preſent circumſtances of the fund he meant, that after that ſum of 5,000*l.* ſubtracted the remaining 17,000*l.* ſhould be the fund, two thirds of the intereſt of which the defendants are to receive. It is a circumſtance, not affording a very ſolid ground of argument, that the power extends over the whole property; and the diſpoſition in favour of the nieces, either by virtue of the power extending over the whole or by the bequeſt of the teſtator out of the whole, muſt have been ſatisfied, however he diminiſhed the property, if ſufficient was left to ſatiſfy it. The wife as reſiduary legatee had an intereſt; by virtue of which without the power ſhe might diſpoſe to the nieces: but if they are to take under the act of the wife, they are to take by her authority, not her intereſt, and not only out of a fund, in which ſhe had an intereſt, but out of the whole; in which ſhe had partly a power and partly an intereſt. Upon the whole the defendants are to take only two thirds of the dividends of 17,000*l.* bank annuities.

As to the other queſtion it is exceedingly probable, the teſtator did not mean ſurvivorſhip: but he has actually given in words creating a joint tenancy; which is not ſevered; and therefore the whole muſt go to him, who ſurvived.

Direct two thirds of the 17,000*l.* bank annuities to be transferred to the Accountant General: the dividends to be paid to the defendant *Thomas Trelawny* for his life; with liberty to apply: the coſts to be paid out of the general reſidue by the plaintiff.

1801.
June 3. 13.

HODSON *v.* ———.

Order upon the Regiſter of the Conſiſtory Court, that an original will may be produced for the hearing upon giving ſecurity.

MR. *Stanley* for the plaintiff moved for an order upon the regiſter of the Conſiſtory Court of *Durham*, that an original will might be produced for the hearing of the cauſe, upon giving ſecurity.

Lord CHANCELLOR aſking, what was the foundation of the juriſdiction, Mr. *Stanley* ſaid, there had been many ſuch orders. His Lordſhip however expreſſing conſiderable doubt upon it, no order was made. Afterwards Mr. *Stanley* repeated the motion; and cited *Forder* v. *Wade* (*a*); referring to former orders; and *Roſs* v. *Cropper*; in which Lord *Roſſlyn* made an order upon the officer of the Eccleſiaſtical Court in *Cheſter*.

Lord CHANCELLOR aſked, what was the nature of the ſecurity; and, who was to ſettle it.

Mr. *Stanley* ſaid, the Maſter, if neceſſary.

Lord CHANCELLOR—How is his judgment to be regulated upon it? Suppoſe a will giving legacies to the amount of 5,000*l.* This is poſſible: if all parties intereſted in the will are before the Court, all thoſe parties might call for an order upon the Regiſter to deliver the will; for, if it ſhould be loſt or cancelled by their having called on him, he would not be anſwerable to any one.

Mr. *Stanley* ſaid, the object of this bill was to have an eſtate ſold for payment of debts.

Mr. *Hart* (*Amicus Curiæ*) ſaid, that in *Baron* v. *Baron*, upon a bill to prove a will, he had obtained ſuch an order.

Lord CHANCELLOR—What authority has the Eccleſiaſtical Court to enforce the Chancellor's order? Would this Court order the officer of the Court of *King's Bench* to produce any of the documents of that Court? However upon the ground of the practice you

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(*a*) 4 *Bro. C. C.* 476.

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you may take the order. I do not know, upon what it ſtands: but I cannot renounce the authority of ſo many of my predeceſſors.

Ordered.

June 13.

Ex parte BROWNE.

Upon a ſeparate commiſſion of bankruptcy the benefit of an inſurance effected by the bankrupt upon his own account upon joint property is not liable to the joint creditors.

THE ſhips *Maria* and *Betſey* the joint property of *Cullen*, *Buddicombe* and *Martin*, were inſured by *Cullen* only; and having been captured, the money recovered from the underwriters was applied in payment of his ſeparate creditors under his bankruptcy. The object of the petition of creditors in reſpect of the outfit and cargoes of the ſhips was to prove againſt the ſeparate eſtate of *Cullen*.

The Lord CHANCELLOR expreſſed on a former day a clear opinion againſt the petition; but it ſtood over upon the ſuggeſtion of Mr. *Richards*, that there was ſome caſe in favour of it.

Mr. *Richards* now referring to *Ex parte Parry* (a) gave up the point; and ſaid, the order in the bankruptcy of *Fitzhenry* and *Rogers* aroſe from a ſlip.

Petition diſmiſſed.

(a) Ante, vol. 5. 575.

June 10. 17.

DINWIDDIE *v.* BAILEY.

Bill by an inſurance broker for a diſcovery and account of money paid and received by him in that capacity on account of the defendants, and money due to him for commiſſion, &c. and for promiſſory notes indorſed to him, and to reſtrain an action, as brought contrary to the univerſal cuſtom of the buſineſs. Demurrer allowed: the ſubject being matter of ſet-off, and capable of proof at law.

THE bill ſtated, that the plaintiff carried on the buſineſs of inſurance broker at *Mancheſter*; and was employed by the defendants from time to time to effect inſurances upon ſhips, goods, wares, and merchandize; and paid divers ſums of money on account thereof; and became entitled as ſuch inſurance broker to divers ſums of money for his commiſſion upon effecting ſuch inſurances, and otherwiſe reſpecting the ſame, and the money received on account thereof, and for poſtage of letters, and upon ſums of money paid, laid out, and expended, on account of the

defendants

defendants in effecting the inſurances, &c.; and that the defendants were alſo indebted in divers ſums of money upon promiſory notes indorſed to the plaintiff in the uſual courſe of buſineſs.

The bill farther ſtated, that the plaintiff received ſome money from the underwriters in reſpect of loſſes upon ſome ſhips; but that it hath conſtantly been the univerſal cuſtom of perſons, who carry on the buſineſs of inſurance brokers at *Llyod*'s Coffee-Houſe, at *Liverpool*, and for all other perſons, who carry on the trade of inſurance brokers, in the buſineſs, which they tranſact for merchants at *Liverpool* or in any other part of the county of *Lancaſter*, to be allowed one month from the day, upon which the loſs upon ſhips or goods, which are inſured, is aſcertained, and the documents reſpecting ſuch loſs found to be ſatisfactory, to obtain the ſignatures of the underwriters to the adjuſtment of the policy, and to apply to ſuch underwriters for payment of their proportions; and at the end of that month, and not before, to accept bills, drawn upon them by the perſons, for whom they effected ſuch inſurances, for the amount of ſuch loſs, until the end of four months from the day, upon which the loſs was aſcertained, and the documents found ſatisfactory; and ſuch cuſtom has been always adopted, and acted upon, by the plaintiff in all his dealings with the defendants; and they have conſtantly allowed the plaintiff the ſaid ſpace of four months for the payment of the amount of the loſſes until the commencement of the action.

The bill then ſtated loſſes upon ſhips under inſurances effected by the plaintiff for the defendants: one ſettled upon the 7th, another, upon the 11th of *October* 1800; which according to the ſaid cuſtom would be payable three months from the 7th and 11th of *November*; that no account of the ſaid dealing was ſtated between the plaintiff and defendants; but an action was brought by the defendants in *December*; in which they held the plaintiff to bail for 1,192 *l.* 5 *s.* 11 *d.*; though the money due in reſpect of the ſaid loſſes was not due until *February*; and the defendants had not drawn upon the plaintiff; and the defendants at the time of the action brought were, and now are, indebted to the plaintiff in a much larger ſum on the accounts before mentioned and alſo by virtue of three promiſory notes; one, dated the 19th of *October* 1799, at 12 months after date for 600 *l.*; another of the ſame date and for the ſame time for 650 *l.*; another, dated the 18th of *November* 1799, at 15 months after date, for 1,440 *l.* 16 *s.*; all indorſed to the plaintiff; and on account a large balance would be found due to the plaintiff. The bill then ſtated applications for the ſums paid for premiums, commiſſion, &c.; that the defendants threaten to proceed to trial; well knowing, that the plaintiff cannot obtain adequate juſtice in the ſaid action without an account, and cannot recover therein the balance due to him from them, as aforeſaid; and prayed an account of the ſums of money paid by the plaintiff for and on account of the defendants in reſpect of the inſurances effected, alſo the money due to him for commiſſion, and otherwiſe reſpecting the ſame, and the money received on account thereof, poſtage of letters, and the other ſums of money, paid, laid out and expended, by him on their account about the ſame, and alſo an account of the money due to him in reſpect of the promiſory notes, of the ſeveral ſums of money he received from the underwriters or others on account of the loſſes, and all other ſums due to them from him; and a decree for payment; offering to pay what ſhall be due from him; and an injunction to reſtrain proceedings at law.

The defendants put in a general demurrer to the diſcovery and relief.

Mr. Mansfield and Mr. Pemberton in ſupport of the demurrer—This bill ſeeks a diſcovery and account, not of money the defendants have received, or with the receipt of which they are acquainted, but of money paid and received by the plaintiff on account of the defendants for premiums of inſurances effected by him for them, alſo of money due to him in reſpect of promiſory notes, alſo money received by him from underwriters on account of loſſes, and money due to him for commiſſion, and paid by him for poſtage of letters or otherwiſe on their account. With reſpect to the cuſtom alleged it is impoſſible for this Court to decide. All theſe matters muſt be tried upon notice of ſet-off.

Lord Chancellor—The fact as to the promiſory notes he could prove without diſcovery. He ſtates the cuſtom; and that in fact ſuch has been your habit of dealing with him. He does not want diſcovery for that. What he has paid for premiums of inſurance, and what for poſtage, is rather in his mind than yours. I do not recollect any ſuch bill.

Mr. Romilly and Mr. W. Agar in ſupport of the bill—The defendants admit the cuſtom by the demurrer, and that all the facts alleged are true. The queſtion therefore is, whether all this account muſt be gone through before a jury. There have been many bills of this nature, by ſtewards for an account between them and their employers, as to receiving rents and paying ſums of money. The defendants muſt make out, that the Court will not maintain a bill for an account at the ſuit of an accounting party. There is one inſtance, in which this queſtion was much diſcuſſed; and an opinion given upon it by a very great authority, in a caſe much more unfavourable to the plaintiff: *Wells* v. *Cooper* (*a*). The bill was filed by the executor of a builder againſt a perſon, who had employed him for many years, and from time to time paid him money; ſtating, that upon the account a balance was due to the teſtator; and charging, that the defendant agreed to account with the executor. The anſwer admitted, that applications had been made; and the defendant had ſaid, that if the plaintiff would produce the account, he would ſettle it in an amicable way; but inſiſted then, that the plaintiff had no right to ſuch an account; and claimed the ſame benefit as if he had demurred. Lord Chief Baron *Eyre* ſaid, it was a very unfavourable caſe, reviving a dormant claim; that, if it was only one matter, it could not be the ſubject of a bill: but, where there had been a ſeries of tranſactions on the one ſide, and of payments on the other, he was not ſatisfied, that it was not matter of account. He diſmiſſed the bill however upon the ground of the length of time, that had elapſed.

This is not a very poſitive opinion, that ſuch a bill may be entertained: but that opinion was expreſſed; and there is no caſe or opinion to the contrary. If any doubt ariſes, whether the cuſtom exiſts, that may be aſcertained hereafter by an iſſue. The plaintiff has a right to a diſcovery on oath, what commiſſion he was entitled to have from them. He ſtates, that at the time of

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(*a*) In the Court of Exchequer, 1791, MSS.

the action brought no ſum was due from him to the defendants; on the contrary, that a large ſum was due from them. *Mundy* v. *Mundy* (*a*) bears ſome analogy to this caſe. A balance muſt be taken to be due to the plaintiff: therefore, as it is ſaid there, nothing is left to try at law.

Mr. Mansfield in reply—I can eaſily conceive ſuch a caſe as that in the Court of Exchequer; mutual tranſactions between two perſons, money paid from time to time, *&c.* eſpecially in the caſe of a builder. But here no account is required from the defendants, that can be had. There is no allegation of any money paid or received by them. This is an abuſe of the term "account;" which ſuppoſes ſomething mutual. All theſe charges are payments and buſineſs done and money received by the plaintiff. I admit the caſe where books or papers are wanted, or, where there are mutual demands: but what books and papers are ſought here: or what mutual demands are there, except as to thoſe promiſory notes indorſed by the defendants? The plaintiff can prove the hand-writing. If he wanted evidence as to his legal demand for commiſſion, that is not a ground for ſuch a bill as this. He does not ſuggeſt the leaſt difficulty in proving, what is due to him for commiſſion, or as to the cuſtom, either general, or as in fact that, upon which they ſettled. As to the ſuppoſed confeſſion of a balance due to the plaintiff, that is *pro hâc vice*, for the purpoſe of arguing the demurrer; but that would turn every action into a bill; for the demurrer would be a confeſſion. The caſe of the Steward is clearly a caſe of mutual accounts.

Lord Chancellor—I ſhould feel infinite reluctance in ſupporting ſuch a bill. It contains rather a ſtatement of facts, the effect of which it is a little difficult to collect. With regard to all theſe allegations, ſome of which import, that he has received, ſome, that he has paid, money, he does not go on to allege, that upon the effect of the whole, taken together, they are indebted to him. The only allegation of debt, that I can find, is with regard to the money due upon the promiſory notes. With reſpect to the allegation of a univerſal cuſtom, if the fact is true, there can be no manner of difficulty in the proof: ſo that, if an action was

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(*a*) *Ante*, vol. 2. 122.

brought before the end of the four months, it would be a complete defence to ſay, according to this general, notorious, cuſtom, very capable of proof, that it was brought too ſoon. With reſpect to this particular fact, it does not proceed upon any alleged ſpecial agreement, the proof, and therefore the diſcovery, of which might be neceſſary to ſuſtain the defence to an action. The bill applies itſelf, not to a ſpecial agreement, but to a fact, capable of proof; out of which it might be for a jury to infer, that there was a ſpecial agreement conformable to the cuſtom. The allegation is, that, taking the whole together, this cuſtom does exiſt at *Lloyd*'s Coffee-Houſe, at *Liverpool*, and in every part of *Lancaſhire*; and that conformably to that cuſtom the plaintiff was conſtantly allowed four months credit; which is a fact to be evidenced by ſome tranſaction; and the gravamen of the bill is, that the action was brought too ſoon: the four months not being expired. He alleges farther, that theſe promiſory notes form a counter-demand; and upon the whole alleges, that a conſiderable ſum of money is due to him; and in the ſenſe, in which ſuch words are uſed, the bill muſt be taken to be true.

It is clear, this caſe might be diſpoſed of altogether at law. It is another queſtion, whether the juriſdiction of this Court might not attach upon it; but it is beyond all doubt, it might be diſpoſed of at law; for every fact alleged is a fact, with regard to which it is impoſſible, that the plaintiff muſt not be in poſſeſſion of proof. He muſt know, what he paid for premiums of inſurance, for poſtage; what was due to him for commiſſion; which is ſettled by the law and uſage of merchants; unleſs there is a ſpecial agreement; which is not alleged. All theſe particulars are known to himſelf. If an action was brought therefore, he would have had only to prove what is here ſtated; which would be eaſy. He has a ſet-off; the ordinary caſe of ſet-off, of a ſum of money, which he ſays is not only equal to their demand, but gives him a right to ſuſtain himſelf as a plaintiff for the balance due to him. It is not to be ſaid, that in every caſe, where the defendant owes more to the plaintiff, that is a ground for a bill. There muſt be mutual demands, forming the ground. The caſe of dower is always conſidered a caſe ſtanding upon its own ſpecialties. So is the caſe of the ſteward. The nature of his dealing is, that money

To ſuſtain a bill for an account there muſt be mutual demands. The caſe of dower ſtands upon its own ſpecialties: ſo the caſe of a ſteward.

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money is paid in confidence, without vouchers; embracing a great variety of accounts with the tenants; and nine times in ten it is impoſſible that juſtice can be done to the ſteward. If I ſuſtain this bill, there never would be an action in the city againſt a broker without a bill in equity. I heſitate exceſſively in permitting ſuch a bill; and the ſtrong inclination of my opinion is, that the demurrer ought to be allowed. I feel great ſanction for the doubt I entertain from the opinion of Lord Chief Juſtice *Eyre* in the caſe cited: a Judge, whoſe habit was not to expreſs doubts, where he had a clear opinion. That caſe is very different, as being the caſe of an executor upon payments made to his teſtator, not of the party himſelf coming for relief. The executor can only go upon conjecture as to the amount of the money paid; and therefore would go to law completely at his peril. There is hardly a caſe of ſet-off, in which a bill might not be ſuſtained, if this may.

June 17.

The cauſe having ſtood over for the purpoſe of ſearching for precedents, Mr. *Agar* ſaid, there were numerous caſes of accounts ſought by a principal againſt a factor, and one upon the bill of the factor againſt the principal, *Chapman* v. *Derby* (*a*); which was diſpoſed of upon another point: but he could not find any caſe of an inſurance broker.

Lord CHANCELLOR ſaid, it was impoſſible to ſuſtain the bill, without laying down, that wherever a perſon is entitled to a ſet-off, he may come into this Court.

The demurrer was afterwards allowed.

(*a*) 2 *Vern.* 117.

M'NAMARA *v.* WILLIAMS.

June 17.

To a bill againſt a vendor for a ſpecific performance his ſtewards and receivers ought not to be made parties.

A ſpecific performance being decreed, the bill as againſt them was diſmiſſed with coſts.

THE bill was filed to obtain a ſpecific performance of an agreement to ſell an eſtate to the plaintiff; which was decreed upon the ſubmiſſion in the anſwer of the vendor; with the uſual directions for an account of the arrear of rents, and the delivery of the title deeds, &c. But a queſtion aroſe as to the propriety of making two perſons of the name of *Allen* parties, as receivers and ſtewards of the eſtate and in poſſeſſion of the Court rolls and title deeds; one of whom by his anſwer ſtated, that he had ceaſed to be Steward in 1795.

Lord CHANCELLOR.—With regard to this bill, as againſt the *Allens*, it is the caſe of a vendor having his Court rolls, &c. in the poſſeſſion of a ſteward. The arrears of rent are aſſigned in this inſtance: but that does not differ this caſe from that of an agreement to be executed in ſix months: if not then executed, ſo that it became neceſſary for the vendor to file a bill, he would be as much entitled to the arrears of the rents, as in this caſe under the expreſs ſtipulation. In ſuch a caſe I never heard of loading the ſuit by making the receivers and ſtewards of the vendor parties. To permit it would be moſt dangerous. In ſome caſes the vendor may be wrong, in others it may be perfectly conſiſtent with juſtice to refuſe to perform the agreement: is the vendee, filing the bill, to go to the ſteward of the vendor, in the one caſe rightly contending, that he is not bound to perform the ageement, and to deſire, pending the ſuit, that the ſteward ſhall not pay the rents to his maſter, but hand them over to him; for if he has a right to maintain the ſuit, when the cauſe comes to a hearing, it is founded upon the right to call for the rents at that moment. There is no ſuch right. The ordinary decree was made for the vendor to account for the arrear of rent. How can this be conſiſtent with the uſual language of the decree, to account for the rent received by him or by any other perſon or perſons by his order or for his uſe? The decree muſt be againſt him for an account of the rents accrued due and received by his ſtewards ſince the time, at which the title was to be made; and according to my view it would be a moſt dangerous thing, if an agreement was to be conſidered by

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a court of equity as changing the character of the ſteward; making him no longer the ſteward of the vendor, but the ſteward of the purchaſer, receiving the rents for him, and not for the vendor, while contending in a ſuit with the purchaſer againſt the performance.

So with reſpect to the title deeds: can the agreement be ſtated to have this effect; that, while the conteſt reſpecting the execution of the contract is going on, it gives the purchaſer a right to call upon the ſteward for the title deeds? That cannot be. He has a right to come here, calling on the vendor to deliver up all the deeds in his cuſtody, power, or poſſeſſion: but theſe deeds, in the hands of the ſteward, are in the view of the Court phyſically in the cuſtody, power or poſſeſſion, of the vendor; and the juriſdiction of the Court is ſatisfied by the order upon him to hand them over to the purchaſer. By the effect of the decree he is bound to get them out of the hands of thoſe perſons; and it is leſs inconvenient to have him attached for not bringing them here, than to permit perſons of this deſcription to be made parties pending the ſuit.

In order to prevent the neceſſity of loading cauſes with unneceſſary parties, this bill as againſt the *Allens* muſt be diſmiſſed with coſts.

June 18.

GREGOR *v.* LORD ARUNDEL.

After two anſwers reported inſufficient the defendant is not entitled to ſix weeks time to anſwer.

MR. *Steele* for the plaintiff moved to diſcharge an order obtained for ſix weeks time to anſwer, after two anſwers reported inſufficient upon exceptions; referring to the general order (*a*).

The motion having ſtood over was granted; and the former order diſcharged with coſts.

(*a*) *January* 23. 1794, 4 *Bro. C. C.* 544.

LLOYD *v.* MAKEAM.

June 13. 18.

Order to ſtrike out the names of two of the plaintiffs on giving ſecurity for coſts made without conſent.

MR. *Cooper* for the plaintiff moved to amend the bill by ſtriking out the names of two of four plaintiffs upon giving ſecurity for coſts. They had executed releaſes to the other plaintiffs. The object was to obtain their evidence. Notice had been given: but the defendants did not appear.

Lord CHANCELLOR refuſed the motion; ſaying, it muſt be upon a poſitive conſent; and on its being then deſired, that they might be made defendants, ſaid, that would not do; as they would then get rid of their liability to coſts.

The motion was afterwards repeated, as originally made, upon the authority of *Motteaux* v. *Mackreth* (*a*); in which Lord *Thurlow* at firſt thought, a conſent was neceſſary for an order to make a plaintiff defendant; but afterwards made the order without conſent. It was ſaid, that the practice had been according to this caſe; and *Pullen*'s caſe was mentioned; in which the Lord Chancellor had been Counſel: the property was very conſiderable; and *Shaw*, a principal plaintiff, was ſtruck out, not only without conſent, but without the knowledge of the defendant.

Mr. *Pemberton* (*Amicus Curiæ*) mentioned *The Attorney General* v. *The Haberdaſhers' Company*, the caſe of *Newport* School; in which an application to ſtrike out the names of ſome of the Relators, with a view to make them witneſſes, was oppoſed by the Lord Chancellor, then at the bar; but was finally ordered upon giving ſecurity for the coſts to that time; and ſaid, there had been ſeveral orders of the ſame kind.

Lord CHANCELLOR ſaid, it ſeemed to him, Lord *Thurlow*'s firſt thoughts in *Motteaux* v. *Mackreth* were right; and he had had an idea, that Lord *Thurlow* had always refuſed it: but upon the authority of that caſe and the practice his Lordſhip granted the motion.

(*a*) *Ante*, vol. 1. 142.

June 19. 22.

MAXWELL *v.* PHILLIPS.

Notice of motion on *Saturday* muſt be given for *Tueſday*, not *Monday*.

MR. *Wyatt* for the plaintiff moved, that an order, that the bill ſhould be diſmiſſed for want of proſecution ſhould be diſcharged for irregularity; the notice of motion being given on *Saturday* for *Monday*.

Lord CHANCELLOR ſaid, that on inquiry at the Regiſter's Office, it appeared, that notice on *Saturday* is not good, unleſs it is given for *Tueſday*.

Order diſcharged.

June 22.

Ex parte SLATER.

Proof under the bankruptcy of one joint debtor after receiving a compoſition from the other expunged: the releaſe to one being a releaſe to both.

PASHLEY and *Dennis* commenced buſineſs in partnerſhip as liquor merchants in *January* 1795; which was diſſolved in *May* 1796; *Paſhley* retiring; and aſſigning to *Dennis* all his ſhare of the partnerſhip ſtock, debts, &c.; being indemnified by *Dennis*. *Paſhley* commenced the ſame buſineſs on his own account. Upon the 13th of *October* 1796 *Dennis* compounded with his creditors for 10*s*. in the pound. *Popplewell* and *Janſen*, two of the creditors of the partnerſhip of *Paſhley* and *Dennis* for 141 *l*. 6 *s*. executed the agreement for *Dennis*'s compoſition. Upon the 25th of *November* a commiſſion of bankruptcy iſſued againſt *Paſhley*; under which *Popplewell* and *Janſen* were permitted to prove their debt; and afterwards they received the compoſition.

The petition was preſented by the aſſignees under the Commiſſion; praying, that the proof of the debt of *Popplewell* and *Janſen* might be expunged.

Mr. *Piggott* in ſupport of the petition cited *Bower* v. *Swadlin* (*a*).

(*a*) 1 *Atk.* 294.

Mr. Romilly againſt the petition.—Without doubt a releaſe to one of two joint debtors is a releaſe to both, according to the caſe cited: but that is upon technical reaſons; and courts of equity have always lamented the neceſſity of following the law in that. It is impoſſible to ſuppoſe any intention to diſcharge this man upon receiving 10*s*. in the pound from the other.

Lord CHANCELLOR made the order according to the prayer of the petition.

MITCHELL *v.* DORS.

June 23.

Injunction, where the defendant having begun to take coal in his own land had worked into that of the plaintiff.

MR. *Mansfield* and Mr. *Bell* moved for an injunction againſt the defendant; who having begun to get coal in his own ground had worked into that of the plaintiff.

Lord CHANCELLOR—That is treſpaſs, not waſte. But I will grant the injunction upon the authority of a caſe before Lord *Thurlow*: a perſon, landlord of two cloſes, had let one to a tenant, who took coal out of that cloſe, and alſo out of the other, which was not demiſed; and the difficulty was, whether the injunction ſhould go as to both; and it was ordered as to both.

Ordered.

Ex parte DAVIES.

Rolls.
June 26.

Deviſe and bequeſt until a certain period from the nature of the purpoſe and circumſtances not tranſmiſſible to repreſentatives.

EDWARD COTTREL by his will gave and bequeathed to his dear wife all his eſtate and effects, both real and perſonal, of whatſoever kind, which he then enjoyed, or might by virtue of any will or wills then made or hereafter to be made in his favour; to be fully enjoyed by her during the minority of his ſon and heir *Henry Cottrel*; which minority he directed ſhould ceaſe and determine on the firſt day of *November* 1805: his ſaid wife until that period finding him with ſuitable education, maintenance, and cloathing; and he declared his will, that from the ſaid period his ſaid ſon ſhould have a moiety of the ſaid income; and that his ſaid wife ſhould enjoy and have to her uſe during her life all the cloaths, jewels, plate, trinkets, linen and furniture, of every kind he then had or hereafter might be poſſeſſed of: at her deceaſe then every thing, as aforeſaid, ſhould totally belong to and centre in his ſaid ſon, his heirs, executors, adminiſtrators, and aſſigns, for ever: if his ſaid ſon ſhould die, before the period of his minority expired, then the whole to reſt with his ſaid wife during her life.

The teſtator then declaring, that he bound his eſtate and effects to pay all his lawful debts and funeral expences, conſtituted and appointed his ſaid dear wife ſole executrix of his will; reſting in the full hope and deſire, that if his wife ſhould want any advice or aſſiſtance, his friends Colonel *Preſton* and *William Barton Berwick*, Eſquire, would give it to her; and for which boon he begged each of them to accept of a mourning ring. Then he gave a ring to *John Cottrel*; and declared, that, if his ſaid wife die, before his ſaid ſon attains the aforeſaid age, he hoped that all or any of theſe three aforeſaid gentlemen would be kind and good enough to act as guardians and truſtees for him during his ſaid minority; and that as ſuch he did thereby nominate and appoint them; and he declared his will, that if his ſaid ſon ſhould die in his minority or afterwards without deviſing the aforeſaid eſtate and effects to his heirs, executors, adminiſtrators, or aſſigns, he then bequeathed the ſaid eſtate and effects unto *John Cottrel*: but he deſired, that notwithſtanding that if his ſon ſhould attain the ſaid age, he ſhould have full power and authority to ſell, give, aſſign, or bequeath, the ſaid eſtate and effects in as full and ample a manner as poſſible notwithſtanding this clauſe.

The teſtator died in 1788. His widow married the petitioner; and died on the 3d of *June* 1800. The petition prayed, that the intereſt, until the ſon ſhould attain the age of twenty-one, ſhould be paid to the petitioner, as adminiſtrator to his wife. The period, at which the ſon would attain twenty-one, would be two or three months before *November* 1805.

Mr. King in ſupport of the petition—This is an abſolute intereſt for a certain period, and tranſmiſſible. The period of minority is extended by the will for two or three months beyond the age of twenty-one: if it had been prolonged for ten years, that would have increaſed the intereſt of the wife. A deviſe during a certain period, or until a certain event is good. It is not merely perſonal to the wife, notwithſtanding the addition as to finding maintenance, &c. That muſt be found by the repreſentative.

Mr. Cox for the infant—Conſidering the nature and purpoſe of the diſpoſition, this conſtruction is impoſſible. The propoſition as to a deviſe till a certain time cannot be diſputed, as a general propoſition, in the caſe of a ſtranger; but this is a diſpoſition of the intereſt of the infant's fortune to his own mother until the period ſpecified, ſhe in the mean time maintaining and educating him. The teſtator might mean ſome benefit to her in the mean time: but is that to go, not only to that near relation, but to any perſon, who may be her perſonal repreſentative? The period is evidently calculated with a view to this particular age, and treated as a period of minority. Nothing is ſaid about the executors or adminiſtrators of the wife: but in another part of the will he provides for the event of her death, before the ſon attains that age; expreſſing his hope, that in that event the three perſons named will act as guardians and truſtees. The petitioner contends, that he is to do that. The dry, general, propoſition cannot apply to ſuch a caſe as this. This is a reſidue. Therefore what is not diſpoſed of accumulates; and no difficulty of that kind can ariſe.

Mr. King in reply—That clauſe does not make a difference; for he meant to diſtinguiſh the ſituation, in which thoſe perſons were to ſtand, from the intereſt veſted in his wife. He cannot be ſuppoſed to intend them to take all the benefit and intereſt he had given to her, and which veſted abſolutely in her by the firſt part of the will, in very ſtrong words. May not they be guardians and truſtees of the perſon of the infant, as to his education, without being entitled to the property, clearly diſpoſed of during a certain period?

The Maſter of the Rolls—The queſtion is, whether this is an abſolute bequeſt of the intereſt until the 1ſt of *November* 1805:

the diſpoſition being general of all real and perſonal eſtate. No doubt, he might have made that bequeſt, and, if ſo, it would paſs to the repreſentative of the wife. At the ſame time that would be a very extraordinary intention againſt his own ſon; giving the intereſt of his fortune to any ſtranger, who might happen to be the executor or adminiſtrator of the widow. It is quite clear upon the whole, that he meant this intereſt to go to her, only provided ſhe ſhould live ſo long, and ſhould be in a ſituation to find her ſon with ſuitable education, maintenance, and cloathing. The expreſſion there is "my ſaid wife." He does not truſt that to any one elſe. He appears here not to have attended to the poſſibility, that ſhe might die before that period. Then afterwards, if ſhe dies during the minority, he appoints guardians and truſtees. As it has been obſerved, there is no uſe for them; for there would be nothing to manage. He would have been at the mercy of the wife to find him with education and maintenance; and that burthen, it is admitted, would have paſſed to her repreſentatives. He ſuppoſes, there would in that event be occaſion for guardians and truſtees. But this farther proviſion occurs: If the ſon dies during the minority, the whole is to reſt with his ſaid wife during her life, not until 1805. The conſtruction therefore is, that though as againſt ſtrangers he meant it only to her for life, yet as againſt his ſon he meant to give it to her repreſentatives: putting ſtrangers in a better ſituation than his ſon. The meaning upon the whole is quite clear; and the petitioner can take nothing.

Petition diſmiſſed.

WALTON *v.* LAW.

Rolls.
June 26.

The caſes, where the bill is retained, that there may be a trial at law, are, where it is neceſſary to eſtabliſh the legal right, in order to found the equitable relief; but, where the ſubject appeared to be matter of law, the bill was diſmiſſed.

THE bill was filed by the executor of a perſon, who died on his paſſage to *England* from the *Eaſt Indies*, for an account of the money received by the defendants under a policy of inſurance upon a ſhip; which was captured.

Mr. *Romilly* for the defendants objected, that this was merely the ſubject of an action.

Mr. *Piggott* for the plaintiff ſaid, then they ought to have demurred; but they anſwered; and went into evidence. He preſſed, that the bill ſhould be retained, in order to try it at law.

Mr. *Romilly* ſaid, the only caſes of that ſort are, where it is neceſſary to eſtabliſh the right at law in order to found the equitable relief; but not to try, whether they have any claim at law; and if they fail there, to come into this Court, and try to raiſe an equity. The defendants may have the ſame benefit at the hearing, as if they had demurred.

The Maſter of the Rolls acknowledged the rule, as ſtated by the defendants; and diſmiſſed the bill.

ASTON *v.* GREGORY.

June 27.
Rolls.

Deviſe in truſt to ſell, and apply the money to and among ſuch perſons as the truſtees in their diſcretion ſhould think had or have any juſt or indiſputable demand upon *A.* at his death, to each in equal degree and proportion according to the principal ſum, as far as the money would extend; the ſecurities to be delivered up: but the money to be given and received in no other manner than as voluntary bounty. The fund, being more than ſufficient, is liable to intereſt of bonds to the extent of the penalties.

RICHARD HAWKINS by his will, made in 1785, deviſed to *Barnard Gregory* and *Walter Marſh*, their heirs and aſſigns, freehold eſtates; in truſt to ſell; and to give and apply the monies, which might ariſe by the ſale or ſales thereof, to and among ſuch perſons, or the legal repreſentatives of ſuch perſons, as the ſaid *Barnard Gregory* and *Walter Marſh*, or the ſurvivor or the heirs of ſuch ſurvivor, in their or his diſcretion ſhould think had or have any juſt or indiſputable demand upon Mr. *William Horton* the elder, deceaſed, at the time of his death; and giving to each ſuch perſon in equal degree and proportion according to the principal ſum, which may appear to be due to them ſeverally and reſpectively, as far as the money ariſing by ſuch ſale or ſales will extend; and upon receipt of ſuch money the perſon or perſons giving the ſame ſhall deliver up to be cancelled any ſecurity in his or their cuſtody or power, which had been given by the ſaid

William Horton to them, or to his, her or their, teſtator or inteſtate; but whatever ſum or ſums of money may be given to any ſuch perſon or perſons by virtue of this my will, thoſe ſums are to be given and received in no other manner than as free and voluntary gifts made by his will to them in teſtimony of the regard he had for *William Horton*.

The bill was filed after the teſtator's death by the creditors of *Horton*; praying a ſale under this will. *Horton* died many years ago inſolvent. A ſale was decreed; and the ſum produced by the ſale amounted to 2,928 *l.*; and there was a fund ariſing from the rents in the hands of the defendants of 617 *l.* 1 *s.* 8 *d.* The only debts carrying intereſt were two old bonds for 200 *l.* and 77 *l.*; and the debts not carrying intereſt amounted to 626 *l.*

The cauſe coming on for farther directions, the reſiduary legatees reſiſted the demand of intereſt upon the bonds up to the penalty.

Mr. *Piggott* and Mr. *Hart* for the plaintiffs inſiſted, that the penalty of the bond being the debt would cover intereſt as well as principal.

Mr. Lloyd and Mr. Wooddeſon for the defendants—The penalty of a bond is not the juſt debt in equity. This queſtion depends upon the conſtruction of the will, the meaning of which is, that all the creditors ſhall be upon an equal footing; and that no perſon ſhould have intereſt upon his debt. They claim only under the voluntary bounty of the teſtator; and this would contradict his intention by giving the bond creditors more than the others.

Mr. *Piggott* in reply was ſtopped by the Court.

The Maſter of the Rolls—It is certainly true, that theſe creditors muſt be contented to take what this teſtator thought fit to give them: if he had ſaid, they ſhould have only the principal without intereſt, they muſt have been contended with that. But the queſtion is, what he meant to give them. He leaves it to truſtees to determine, what are juſt and indiſputable debts. Thoſe debts he meant to pay. Then the intereſt of the debt is juſt as much a part of the debt as the principal ſum. I do not agree, that if he had ſaid, only the principal ſhould be paid, that would extend to the penalty of the bond. In that caſe there would be a clear diſtinction between principal and intereſt. But theſe words "the principal ſum" are introduced for a very different purpoſe. He means, that the debts ſhall be paid: but in caſe of deficiency to pay all he directs them to be paid in equal degrees and proportions according to the principal ſum. He does not ſay, "the principal ſum," or "only the principal ſum:" but if it is neceſſary to reſort to degrees and proportions, that is to regulate the proportions, as far as the money ariſing from the ſale will extend; and he expreſſes an apprehenſion, that the money might not extend far enough to pay all, that was due. But if there ſhould be no neceſſity to make an apportionment, then what he meant to be paid was the debt; and the queſtion is, whether the intereſt is not a part of the debt. The intereſt therefore muſt be included to the extent of the penalty.

ROACH *v.* HAYNES.

June 29.

Rolls.

Teſtatrix gave a fund, over which ſhe had a power of appointment, and ſome ſpecific articles to truſtees, in truſt for her reſiduary legatee after named; and gave the general reſidue to *A.* By a codicil ſhe revoked the bequeſt of the reſidue; and gave it to *A.* and *B.* *A* was held ſolely entitled to the fund under the appointment.

CATHERINE HAYNES by her will, reciting the will of *David Franco*, and that he had given to *Ann Roach* an annuity of 300*l.* for life, and two other annuities of 100*l.* and 50*l.*, and 30*l.* a year to each of his ſervants, who had lived with him five years, and for ſecuring the payment of the ſaid annuities directed his executors to purchaſe Long Annuities in the names of *Tomkyns Dew* and *Albany Wallis*, ſufficient to anſwer them, in truſt, among other things, to pay the annuities; and as to ſo much of the annuities to be purchaſed as ſhould be appropriated to the annuities of *Ann Roach*, *Jane Kenſey*, and *John Roach*, when and as they ſhould reſpectively die, all arrears of their annuities being paid, that the truſtees ſhould ſtand poſſeſſed thereof to and for the ſeparate uſe of *Catherine Haynes* notwithſtanding preſent or future coverture; and to be applied and diſpoſed of in ſuch manner as ſhe ſhould in writing under her hand and ſeal or by her laſt will and teſtament direct or appoint; and in caſe of no ſuch will, direction, or appointment, the ſame Long Annuities ſhould become part of the reſidue of his perſonal eſtate; and as to the annuities purchaſed to anſwer the other annuities, as thoſe annuities fall in, to become part of the reſidue of his perſonal eſtate; in farther execution of the powers and authorities in her veſted gave, bequeathed, directed, limited, and appointed, the ſaid Long Annuities ſo purchaſed or to be purchaſed for ſecuring unto *Ann Roach, &c.* the ſaid ſeveral annuities during their reſpective lives, and given to her after the ſeveral deceaſes, as aforeſaid, and alſo all her plate, linen, china, houſehold furniture, ſtock of cattle, and other ſtock, goods, and chattels whatſoever at *Loneſome* or elſewhere at the time of her deceaſe, unto the ſaid *Tomkyns Dew* and *Albany Wallis*; in truſt, that they and the ſurvivor of them and the executors and adminiſtrators of ſuch ſurvivor ſhall ſtand poſſeſſed thereof for the uſe and benefit of her reſiduary legatee hereinafter named. All her other eſtate and effects not hereinbefore diſpoſed, and which ſhe had in poſſeſſion, or was any way entitled to, and had power to diſpoſe of, ſhe did thereby give and bequeath, direct, limit, or appoint, the ſame unto her ſon *David Haynes*, his executors, *&c.*; and ſhe appointed *Dew* and *Wallis* her executors.

The teſtatrix afterwards in 1796 made the following codicil: "I *Catherine Haynes*, having by my will, dated the 19th of *September* 1788, given my ſon *William* 1,000*l.* and the reſidue of "my eſtate to my ſon *David*, and having alſo given legacies to "my own maid ſervant and other domeſtic ſervants, I do hereby "revoke all the above bequeſts; and give the reſidue of my eſtate "and effects unto my ſons *William* and *David Haynes* equally "between them."

Then, after giving ſeveral pecuniary legacies and her wearing apparel to her maid ſervants, equally to be divided among them, as ſhould be living with her at her death, ſhe added, that with theſe alterations ſhe confirmed her will; revoking allot her codicils; and declaring this to be the only codicil to her ſaid will.

The bill was filed by the annuitants. The only queſtion was between the defendants: *David Haynes* claiming ſolely under the appointment: *William Haynes* claiming jointly with him; and the reſiduary legatees of *Franco* claiming the fund as undiſpoſed of.

Mr. Hart for the defendant David Haynes—The teſtatrix has ſufficiently executed the power of appointment, and done no act to invalidate it. The power is general, not limited either to time or objects. The gift to *Dew* and *Wallis* is a complete execution of the power; and the teſtatrix has directed the application. She has certainly added a deſignation of the perſon to have the benefit; *viz.* her reſiduary legatee hereinafter named. The queſtion then is, whether by a codicil, depriving that perſon of the deſcription of ſole reſiduary legatee ſhe ſhall be conſidered as ſubſtituting another perſon, who is thereby joined with him in that character. But the codicil has no reference to the execution of this power. It is merely a reſiduary diſpoſition to two perſons jointly. This fund is not given as part of the reſidue. The codicil is not the will itſelf; though it is part of the will, as to the reſidue, upon which it treats, and to which it is confined; and being directed to operate as a revocation of diſtinct parts of her will it cannot operate beyond that.

Mr. Stanley for the defendant William Haynes—This defendant is under the codicil entitled to one moiety of all the reſidue, including the fund appropriated to anſwer theſe annuities. The object of the teſtator *Franco* was only, that the fund ſhould not be in the diſpoſition of the huſband of *Catherine Haynes*, but that ſhe ſhould have the ſeparate diſpoſition of it. The true conſtruction of her will is to unite that property to her general perſonal eſtate; and giving the whole to *David Haynes* ſhe does not mean to diſtinguiſh between this fund and her general perſonal eſtate. Then ſhe revokes the reſiduary bequeſt to *David*; and gives the reſidue to both of them.

Mr. *Trower* for the reſiduary legatees under the will of *Franco* claimed this fund; inſiſting, that the reſiduary bequeſt in the will of *Catherine Haynes* was entirely revoked; and the codicil was confined to the reſiduary perſonal eſtate, without reference to this fund.

The Maſter of the Rolls—There is no doubt in this caſe, and it is admitted, there would be a good appointment, if it ſtood merely upon the will. Then what does the will do? It gives the capital ſet apart to anſwer the annuities and ſome ſpecific articles, plate,

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linen, china, &c., to truſtees in truſt for her reſiduary legatee therein after named. So ſhe ſeparates from her reſidue the capital of the annuities and theſe ſpecific effects; and veſts them in truſtees. The will then goes on to give the reſidue directly, and without the interpoſition of truſtees, to her ſon *David Haynes*. There is therefore an appointment for the benefit of the perſon, to whom ſhe ſhall give the reſidue; who turns out to be *David Haynes*. Then does the codicil, revoking the bequeſt of the reſidue, extend to the ſpecific articles ſhe had given to the truſtees? That would be contrary to the intention; which was to ſeparate them and take them from the reſidue. Then if *David* is to have theſe ſpecific articles, is he not to have the capital of this fund; which is equally ſeparated from the reſidue? The concluſion is, that the codicil does not in the leaſt affect this fund. A nice argument is uſed for the reſiduary legatees of *Franco*; that the codicil does affect it for one purpoſe, *viz.* to revoke the diſpoſition, but not for the other. If the effect was to throw the whole into the reſidue, then the codicil would affect it.

Declare *David Haynes* ſolely entitled.

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June 30.

Ex parte STERNE.

The Court refuſed upon an *ex parte* petition to order money to be paid under the ſtatute 40 *Geo.* 3. *c.* 56.; the ſubject involving a doubtful queſtion, *viz.* the conſtruction of a truſt of an eſtate for lives, to permit two ſiſters to re-receive the rents for their lives; remainder to the heirs of their bodies; and in caſe they ſhould die without iſſue, from and after their deceaſes, over.

By indentures, dated the 3d of *July* 1757, the Archbiſhop of *York* demiſed certain premiſes to *William Sterne*; to hold to him, his heirs and aſſigns, for the lives of himſelf and two other perſons.

William Sterne by his will, dated the 24th of *March* 1770, gave to truſtees and their heirs the lands compriſed in the leaſe; to hold the ſame to them and their heirs; upon truſt to permit his two daughters to take and receive the rents, iſſues, and profits thereof for and during their natural lives; with remainder to the heirs of their bodies lawfully begotten; and in caſe they ſhould die without iſſue, from and after their deceaſes upon truſt to convey and aſſign the ſame to and for the uſe of his ſon *William Sterne* and the heirs of his body lawfully to be begotten; and in caſe he ſhould die without iſſue, and the teſtator's wife ſhould ſurvive his ſaid children, he gave the ſaid leaſehold lands to the uſe of his ſaid wife, her heirs, executors, adminiſtrators, and aſſigns, for ever.

The teſtator died; leaving his wife ſurviving, and all the children mentioned in the will, infants. In *December* 1775 articles were executed for the ſale of the eſtate, as ſoon as an act of Parliament could be procured, to *Hodgkinſon*, his heirs, and aſſigns, during the remaining lives for 1,200*l.*

By the act of Parliament, which was obtained, it was enacted, that the reſidue of the purchaſe money, after paying the coſts, ſhould be laid out by the truſtees in the purchaſe of lands and hereditaments, to be ſettled and conveyed to ſuch and the ſame uſes, and upon and to the ſame truſts and purpoſes, as the premiſes ſtood limited under the will; and that the money ſhould be paid into the Bank and laid out, till a proper purchaſe could be procured: the dividends in the mean time to be paid to ſuch perſon or perſons as would for the time being be entitled to receive the yearly rents and profits.

The clear produce of the ſale was 1,190*l.* 14*s.* 10*d.* 3 *per cent.* Conſolidated Bank Annuities, and 17*l.* 17*s.* caſh. The petition was preſented by the teſtator's two daughters, who had attained the age of 21; praying a transfer under the late act of Parliament (*a*). When the petition was opened, the Maſter of the Rolls expreſſed conſiderable doubt, whether it could be granted; and it ſtood for judgment.

(*b*) *Maſter of the Rolls* (after ſtating the caſe)—I apprehend, the act for the relief of tenants in tail only applies to caſes, where the right is clear and indiſputable; and, that, where there is any queſtion, the Court in an *ex parte* petition is not to enter into the queſtion in the abſence of all the parties entitled. But, if a

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(*a*) Stat. 40 *Geo.* 3. *c.* 56. Upon this act of Parliament ſee *Ex parte Bennet*, *Ex parte Dolman*, *ante*, 116, and the note (*a*), *ante*, vol. 5. 12.

(*b*) *Ex relatione.*

queſtion occurs, whether the party applying be tenant for life or tenant in tail, I apprehend, the Court upon an *ex parte* petition would not under the ſtatute, (notwithſtanding the inclination of the Court might be when the queſtion came to be diſcuſſed, to hold the party to be tenant in tail) decide the right.

The queſtion therefore is, whether there is in this caſe a fair doubt.

It appears to me, that there is in this caſe a fair doubt. The Act of Parliament has gone no farther than to allow the money to be laid out in freehold lands of inheritance.

An intereſt in an eſtate *pur auter vie*, that would be an eſtate tail, if applied to freehold lands of inheritance, may be diſpoſed of by deed.

Where a perſon has an intereſt in an eſtate *pur auter vie*, which would be an eſtate tail, if applied to freehold lands of inheritance, he may diſpoſe of ſuch eſtate *pur auter vie* by deed. But it may be a queſtion, whether the blending of eſtates in freehold lands of inheritance does or does not neceſſarily apply to eſtates *pur auter vie*.

In reſpect to freehold lands it is ſaid ſometimes, that the freehold cannot be an abeyance: but here is no fee. Sometimes it has been held, that the eſtates ſhall unite, the better to effectuate the general intent: but that is not neceſſary in an eſtate *pur auter vie*; for there is no deſcent: the heir takes as ſpecial occupant: therefore there is no neceſſity, that the eſtate for life, and the eſtate in remainder ſhould unite. *Forſter* v. *Forſter* (*a*). *Williams* v. *Jekyl* (*b*).

An eſtate *pur auter vie* may be limited in tail.

It has been ſettled, that an eſtate *pur auter vie* may be limited in tail: *Low* v. *Burron* (*c*); which was a limitation of a freehold leaſe for life with remainder to the heirs of the body in tail.

But ſuppoſing it as a general rule quite clear, that the two eſtates would unite together, there is ſtill upon this will a queſtion, whether by the particular wording of the will the teſtator's intention was not to confine the firſt taker to an eſtate for life, and that in this particular caſe the two eſtates ſhould not unite.

(*a*) 2 *Atk.* 259. (*b*) 2 *Veſ.* 681. (*c*) 3 *P. Will.* 262.

With

Ex parte Sterne.

A limitation, which would create an eſtate tail as to freehold property, would give the abſolute intereſt as to perſonal eſtate.

With reſpect to perſonal eſtate it has been held, that where there is a limitation, which, if it were freehold property, would create an eſtate tail, it ſhall give the abſolute intereſt in perſonalty: *Hodgeſon* v. *Buſſey* (*a*). *Read* v. *Snell* (*b*). *Sabbarton* v. *Sabbarton* (*c*). But this is the caſe of a truſt, and there is ſtrong ground for the iſſue or remainder men to contend, that, taking the whole of this will together, it was the intention, that the daughters ſhould only take for life. I do not ſay, how it would be determined. It is ſufficient to ſay, that it creates doubt enough for me not to decide it in this ſummary way, and therefore I muſt refuſe the prayer of the petition.

Petition diſmiſſed.

(*a*) 2 *Atk.* 82. (*b*) 2 *Atk.* 642.

(*c*) *For.* 245. See *Rawlins* v. *Goldfrap*, *ante*, vol. 5. 440. and the references in the note 444.

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A reſiduary bequeſt upon the whole will veſted only as the property was received: one of the reſiduary legatees therefore being dead, his repreſentatives were entitled only to that part, which was got in before his death.

John Strettell by his will, dated the 3d of *March* 1786, confirming his marriage ſettlement, by a bond, previous to his marriage, the condition of which he ſtated that he had performed by a deviſe of his houſe at *Croydon* and a transfer of 11,000 *l.* 3 *per cent.* Conſolidated Bank Annuities, in addition gave to his wife an annuity of 395 *l.*; to be paid out of the beſt ſecurity he ſhould die poſſeſſed of, except his eſtate, called *Gotwick*; and directed, that ſuch ſecurity ſhould afterwards be conſidered as part of the fortune bequeathed to his ſon *Amos*, and ſhould be eſtimated at 16,000 *l.* He gave his wife the houſe at *Croydon*, the uſe of his furniture, plate, and the choice of the furniture of one of his houſes; and made ſeveral other bequeſts in her favour; and directed, that after her deceaſe the ſaid ſeveral particulars, or ſuch as ſhall be exiſting, ſhall be either kept for the uſe of his ſon, or be ſold, and that the produce ſhould fall into the reſidue of his perſonal eſtate, according as his wife ſhall by will appoint; and for want of appointment that the ſame ſhall be ſold for the purpoſe aforeſaid. All the remainder of his goods, chattels, furniture, &c. after his wife ſhould have made ſuch choice, he directed ſhould be ſold by his executors; and that *Joſeph Brickwood*, hereinafter named, ſhould have the preference of purchaſing the leaſe of his houſe in *Riche's Court*, with the furniture.

The teſtator then gave to his friends *Daniel Mildred*, *John Harman*, *Alexander Forbes*, and his brother-in-law *Joſeph Hayling*, deſcribing them as his executors hereinafter named, freehold eſtates, deſcribing them, and all other his freehold eſtates; to hold to them, their heirs and aſſigns, for ever; as to the houſe at *Croydon* to the uſe of his wife for life in part of the proviſion by her marriage ſettlement; and after her deceaſe to other uſes; and as to *Gotwick* and other premiſes, in caſe his ſon ſhould attain the age of twenty-one, in truſt to convey to the uſe of his ſon for life, without impeachment of waſte; remainder to his iſſue in tail; and for want of ſuch iſſue, or, in caſe there ſhould be none, who ſhould attain twenty-one, over; and he gave all the other eſtates to other uſes. He gave his ſon 30,000 *l.* to be paid him, when he ſhall attain the age of twenty-one, or as ſoon after as he can be put in poſſeſſion thereof, according to the direction after mentioned: that is to ſay: he directed, that the ſeveral funds or ſecurities, which ſhould be appropriated for the ſecuring the aforeſaid annuity of 800 *l.* to his wife, (made up of the intereſt and rents provided by him in performance of his marriage ſettlement and the additional annuity of 395 *l.*) which altogether ſhould be conſidered of the value of 16,000 *l.* and no more, ſhould be computed as part of the 30,000 *l.*; the remaining 14,000 *l.* to make up the ſame to be appropriated or ſet apart and inveſted by his executors at intereſt: the eſtate at *Gotwick* to be conſidered as part of the 14,000 *l.* and valued at 1,000 *l.*: ſuch other of his real eſtates as his executors ſhould not find it neceſſary to mortgage or ſell for the purpoſes after mentioned, to be conſidered as a farther part, and be conveyed to him in fee; to be valued at twenty years purchaſe upon the improved rent. He empowered his executors and truſtees to advance and pay out of his eſtate any ſum, not exceeding 1,500 *l.* to be laid out in educating his ſon. He gave his ſon an annuity of 150 *l.* purchaſed by him for the lives of himſelf and his ſon; to be kept inſured upon his ſon's life until his age of twenty-one: the ſurplus income to be applied to maintenance and education; with full power to his executors, as his ſon ſhould advance in years, to make any farther allowance out of his eſtate for the purpoſe aforeſaid: the reſidue of the income of his ſon's fortune beyond maintenance and education to be applied in or towards payment of the ſeveral annuities after mentioned and bequeathed.

The teſtator then appointed his wife ſole guardian of his ſon until his age of twenty-one; and in caſe of her deceaſe he appointed his executors and *Brickwood;* expreſſing particular confidence in the latter; that he will exert himſelf for his (the teſtator's) ſon's intereſt; and reciting, that he had made his will under the fulleſt conviction, that his fortune would ultimately amount to the ſum of 45,000 *l.* or upwards, he proceeds to make the following beqneſts:

To his wife 2,000 *l.* to be at her diſpoſal by will: the intereſt during her life to be applied to the other purpoſes of his will; empowering her to apply it or any part during her life for the advantage of their ſon: to *Forbes* 100 *l.* and ſeveral other pecuniary legacies; and he recommended to his executors, if the ſame could conveniently be done, to diſcharge all theſe laſt mentioned legacies at one payment, without waiting for the general diſtribution herein after mentioned and provided: to *Hayling* 500 *l.*; and ſeveral other legacies; ſome, ſubject to conditions. The will then proceeded thus:

" I give to my very worthy and kind friends *Daniel Mildred*
" and *John Harman* two of my executors hereinafter named the
" ſum of 500*l.* each; with my moſt grateful acknowledgements
" for that laſt eſſential proof of their affection and regard. I alſo
" give to my friend *Alexander Forbes*, one other of my execu-
" tors, the ſum of 400 *l.*; and to my brother-in-law *Joſeph Hay-*
" *ling*, my other executor, 250 *l.*: but theſe four legacies to my
" ſaid executors are not to be paid in preference to any other of
" the legacies herein laſt before given; and I give to Mr. *John*
" *Brickwood*, who will be aſſiſting to my executors in collecting
" my effects and ſettling my affairs, the ſum of 500 *l.*"

He then gave ſeveral annuities, among them 50 *l.* a year to *Forbes* for life; and if they find occaſion for the extenſion of the annuities, authorizes his executors, in caſe the circumſtances of

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his fortune will admit it, to extend the annuities to any ſum not exceeding 100 *l. per annum*; and he directed his executors at the beginning of the annuities for ſecuring the payment thereof to inveſt a ſufficient part of his perſonal eſtate in the funds or mortgages at their diſcretion; diſtinguiſhing in their accounts the capital for each annuitant; that at their deceaſe the ſame my be applied in manner hereinafter directed. He then proceeds thus:

“ And whereas by reaſon of the agreement I have lately entered “ into with Mr. *John Brickwood* before named, and Mr. *Thomas* “ *Pattle* junior, for their taking to themſelves my debts owing in “ *America*, and paying me the ſame by inſtalments, to be ſecured “ by their bond or bonds, I cannot fix any period for the pay-“ ment of the pecuniary legacies or the annuities hereinbefore “ given, which are not already particularly directed as to time, “ I muſt leave it to the diſcretion of my executors to make a “ firſt dividend upon the ſaid legacies, ſo ſoon after the receipt of “ the ſaid Meſſrs. *Brickwood* and *Pattle*'s firſt payment as they “ ſhall have ſufficient to divide 5*s*. in the pound or any greater “ ſum among my ſaid legatees; and at the ſame time inveſt or “ ſet apart for the ſaid annuitants a ſufficient ſum or ſums to “ produce and bring in one quarter part of their annuities; and “ the like proportions to be continued, until the whole are diſ-“ charged or provided for: my ſaid ſon's fortune in every ſuch “ diviſion being conſidered a creditor for 14,000 *l.*;” and for the more ſpeedy payment of the ſaid legacies and annuities “ my “ ſaid executors” to mortgage or ſell all or any part of his real eſtate before deviſed, except the houſes at *Croydon* and *Gotwick*; and to cut timber and underwood upon the latter, when of ſufficient growth: the annuities to *Forbes* and ſome others to be paid quarterly, and to commence three months after his deceaſe. He gave three other annuities, payable quarterly; directing the firſt payment thereof to be made, when his executors ſhall have ſufficient effects in their hands to inveſt one quarter part of the capital producing the ſame, and from thence to continue payable, as aforeſaid; and he ſubmitted the ſettlement of accounts with his late brother to his executors; and gave directions for the adjuſtment of other accounts; and declared, it was not his intention to extinguiſh debts from legatees; but ſuch debts to be firſt paid. The will then proceeded thus:

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“ And whereas the long minority of my ſon will moſt probably “ create a conſiderable addition to my fortune, and it is my earneſt “ wiſh and intention, that my reſiduary legatees ſhall each of “ them receive 500 *l.* at the leaſt over and above their reſpective “ legacies, I therefore direct, that, when that ſum can clearly be “ aſcertained to them, after proviſion for the payment of my ſon's “ fortune and the ſeveral legacies and annuities herein before contained, then what farther ſhall be received or accumulated of “ my eſtate ſhall be diſpoſed of as follows: to wit, to my ſon “ *Amos* the ſum of 2,500 *l.* in addition to his fortune, and payable at the ſame time therewith: to the ſeveral pecuniary legatees, whoſe legacies are to be gradually diſcharged by way “ of dividend, as herein before is directed, the further ſum of “ 25 *l. per cent.* or one quarter part more upon the capitals of “ their reſpective legacies; and if any farther ſurplus ſhall be “ made or ariſe, be it more or leſs, the ſame to go and be equally “ divided among my reſiduary legatees or ſuch of them as ſhall “ be then living: but in caſe my ſaid ſon ſhall happen to depart “ this life, before he attains the age of twenty-one years, his fortune being then in the hands of my executors, I give and bequeath to my ſeveral annuitants herein after named the ſeveral “ annuities herein after mentioned; with ſuch conditions, and “ the capital producing the ſame to go and be applied in like “ manner, as herein before is mentioned and appointed reſpecting “ the annuities herein before given to them;” then after giving his wife 300 *l.* a year, *Forbes* 100*l.* a year, and two other annuities, “ but in caſe my ſaid ſon's fortune ſhall not be then “ all in hand, then ſuch ſmaller equally proportioned augmentation of the ſaid annuities as the part of my ſon's fortune in “ hand will admit;” and after the deceaſe of his wife and proviſion being made for his then ſurviving annuitants he bequeaths the money then in the hands of his executors, in ninths; and after the diſpoſition of eight ninths concludes thus:

“ And the remaining ninth part thereof in equal ſhares to “ ſuch of my reſiduary legatees as ſhall be then living; and as “ the then remaining annuitants ſhall from time to time depart “ this life, the fund for payment of their annuities, which is not “ herein before ſpecifically diſpoſed of, ſhall go to and be equally “ divided among ſuch of my reſiduary legatees as ſhall be living “ at

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"at the deceaſe of each ſeparate annuitant; and as to all the "reſt, reſidue and remainder, of my eſtate and effects, whatſo-"ever and whereſoever, after payment of my debts, funeral ex-"pences, and the legacies and annuities herein before given, I "give and bequeath the ſame and every part thereof equally to be "divided among my good friends and executors, *Daniel Mildred*, "*John Harman*, *Alexander Forbes*, and *Joſeph Hayling*, and Mr. "*John Brickwood*, herein before named; in whoſe zeal reſpecting "the aſſiſting my executors in collecting my effects and ſettling "my affairs and in whoſe attachment to the intereſt and welfare "of my dear wiſe and child I place the moſt unreſerved confi-"dence."

The teſtator then, after ſome farther expreſſions of confidence in *Brickwood* declared, that he ſhould not be entitled to receive any part of the reſidue of his eſtate herein before bequeathed to him, until the bonds given to the teſtator by him and *Pattle* ſhall be fully paid and diſcharged; and he then appointed *Mildred*, *Harman*, *Forbes*, and *Hayling*, executors; and directed, that in caſe of the death of the truſtees the ſurvivors from time to time ſhould appoint new truſtees; and that a legacy of 250*l.* ſhould be paid to each new truſtee upon his appointment; and gave powers to the truſtees to compound debts and ſubmit to arbitration; with the common clauſe of indemnity.

The teſtator died upon the 28th of *July* 1786. *Mildred* died in *February* 1788: *Forbes* in *October* 1790; and *Hayling* in *January* 1796. *Forbes* bequeathed all his eſtate and effects to his ſiſter; whoſe reſiduary legatee and adminiſtrator with the will annexed filed the bill; claiming a fifth of the reſidue under *Strettel*'s will, as veſted at his death in *Forbes*. That claim was reſiſted, except as to ſo much as was got in during the life of *Forbes*.

Mr. Lloyd, Mr. Romilly, and Mr. Ainge, for the plaintiffs—Mr. Alexander and Mr. Toller for the repreſentatives of Mildred—Mr. Stanley for the repreſentatives of Hayling.—The queſtion is, what intereſt theſe reſiduary legatees had in the reſidue; and at what particular times ſuch reſidue veſted in them: the ſurviving truſtees inſiſting, there was no veſted intereſt in the ſurplus at the death of the teſtator; but, that it was to be divided at the time of the

making

making or ariſing of ſuch ſurplus. The part of the will, upon which that is contended, expreſſing an intention, that each of his reſiduary legatees ſhall receive 500*l.* at leaſt in addition, when that ſum can clearly be aſcertained to them, applies only to his ſon's fortune; and will not control the ſubſequent general reſiduary clauſe; which no doubt veſts the reſidue in them as tenants in common; for no particular period is expreſſed there. His property being abroad, he could not aſcertain, when the whole of the legacies would be paid; and therefore he adopts the mode of an addition of 25 *per cent.* In the caſe of two contradictory clauſes in a will the latter muſt control (*a*). The inclination of the Court is always to veſt a reſidue; and there is a great difference in that reſpect between a reſidue and a pecuniary legacy: where in any event the reſidue is given to a perſon, who ſurvives the teſtator, the ſtrongeſt ground is neceſſary to make out an inteſtacy. The conſtruction of the defendants is, that as every ſhilling was received, ſo it was to veſt; a conſtruction never before attempted. The ſurvivors of theſe reſiduary legatees by the accident of their ſurviving claim ſo much as had not been got in. Suppoſe, they alſo had died: could it be ſaid, with that clauſe in the will, there was a general inteſtacy? He cannot be underſtood to mean, that he gives that addition only, when that ſum ariſes: but if ever that ſum can be clearly aſcertained, theſe additions ſhall be paid. It is very uncertain, to what the words "or ſuch of "them as ſhall be then living," in that part of the will, ſhall be referred. It will be ſaid, they refer to the time, when the ſurplus ſhall be made, or ariſe. Nothing can be more vague. It may be ſaid to ariſe, when it is aſcertained, as well as when it is paid to the executors. There is nothing in favour of the latter inference. Then comes the general, reſiduary diſpoſition; and then only he names his reſiduary legatees.

But ſuppoſe, there was no ſuch obſcurity, and the intention was clear to confine it to the time of actual receipt, the Court cannot carry that intention into execution. That point was decided in *Hutcheon* v. *Manning* (*b*). Lord *Thurlow* thought, there would be great danger in leaving it to the executor to determine, who

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(*a*) *Conſtantine* v. *Conſtantine*, *ante*, 100. *Sims* v. *Doughty*, *ante*, vol. 5. 243.

(*b*) *Ante*, vol. 1. 366. by miſtake named *Hutchin* v. *Mannington*. See *Sitwell* v. *Barnard*. *Poſt*.

would be entitled, by delaying the payment. That objection is of greater weight in this caſe; for there the executors were to determine between ſtrangers; and had no intereſt to delay it: but all theſe reſiduary legatees except one are alſo executors. It might be their intereſt to delay it and ſpeculate upon the chance of ſurviving any one reſiduary legatee; and *Brickwood* as one of the purchaſers of the debts in *America* had the means of influencing the payment of the reſidue, and by protracting the payment of determining, to whom the reſidue ſhould go. The poſſibility of ſuch management will determine the Court to adopt the general rule eſtabliſhed in that caſe, and ſince cited and acted upon in *Stapleton* v. *Palmer* (*a*), and *Kirkpatrick* v. *Kirkpatrick* (*b*).

Mr. Piggott, *Mr. Richards*, and *Mr. Winthrop for the two ſurviving reſiduary legatees, defendants*—This will makes a complete diſpoſition of all the teſtator's property in the preceding part; and the only object of the general clauſe at the cloſe of it is to name the reſiduary legatees, no where named before. The teſtator had already given the reſidue. At the cloſe of the will he only repeats the gift for that particular purpoſe. Is that to efface all, that was before done? This was a gift upon the ground of perſonal exertion in the ſettlement of his affairs; as the beſt mode of ſecuring this fortune to his ſon. Upon the plaintiff's conſtruction they are entitled, without regard to the principal object, their exertions, or the time of their deaths. Upon ſuch a will the intention is clear. No difficulty can ariſe upon it. What part of the reſidue was got in in 1788, when one died, what part in 1790, when another died, theſe are facts, that can be aſcertained; and ſo much can be divided, if the preceding charges are paid. As to the alleged danger of enabling ſome executors to defraud others, if fraud is ſhewn, the Court would not let it have effect: but that is not pretended in this caſe. In a very late caſe, *Innes* v. *Mitchell* (*c*), a debt was bequeathed at a particular day; whatſoever it might be; and then it was aſcertained; and this may be as eaſily aſcertained. Such a diſpoſition is far from being unwiſe or impolitic; uniting intereſt with duty. *Hutcheon* v. *Manning* is no authority upon this caſe. It is clearly diſtinguiſhable. There was firſt a gift to the legatees, not accompanied by any condition, but abſolute. Death before

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(*a*) 4 *Bro. C. C.* 490.

(*b*) At the Rolls.

(*c*) At the Rolls, *Trin.* Term, 1801. *Poſt.*

receipt was the bare naked fact, upon which it was to diveſt. No time was fixed for the payment: if it had been ſo given, it is plain from Lord *Thurlow*'s reaſoning, he would have referred the receipt to that time, upon the common principle, that executors are to be ſuppoſed to perform their duty. His difficulty was, to what time he was to refer the bare naked fact of the receipt: was it to depend upon the caprice of the executor? There might have been infants or married women; which might have prevented the receipt. The preſent Lord Chancellor ſeems to have felt the nature of that opinion as very doubtful; and finally the parties ſtood upon the agreement. Is that like a gift of this ſort, to reſiduary legatees; and no uncertainty as to the time, or the fund; which is what is left after the legacies, *&c.* are paid? This is a condition precedent to the gift, not to diveſt it. If they are not living, nothing is given to them. The general plan of the will is founded upon the circumſtance, that the teſtator had a conſiderable property outſtanding; that might be made more or leſs available according to the exertions or negligence of his executors; and the intention is clearly ſuch of theſe reſiduary legatees as ſhould be living, when the ſurplus ſhould be received and actually in hand. Lord *Roſslyn* certainly did not confirm *Hutcheon* v. *Manning* in *Stapleton* v. *Palmer*; which was decided upon the fact, that they all concurred in the direction as to the ſale: but it is not neceſſary to diſpute the former caſe. No two caſes can be more diſſimilar.

Mr. Lloyd in reply—The argument for theſe defendants goes upon minute obſervation upon a very inaccurate will. The teſtator had in effect named his reſiduary legatees in the will by giving them particular legacies; and then his naming them in the latter part is not material. It does not appear, that this was given to them for their exertions and in that character. It is extraordinary, that it is not expreſſed to be given to them for their care and trouble: nor is the word "ſurvivors" inſerted. That their exertions were the conſideration is mere conjecture. He muſt have had a conſiderable regard for each of them, not in the character of executors; and muſt have intended a benefit to their families. No act or negligence of executors can vary the rights of the parties. In *Booth* v. *Booth* (*a*) and many other caſes the Court has ſtrained againſt an inteſtacy; where the reſidue is given.

(*a*) *Ante*, vol. 4. 399.

given. So abſurd a conſtruction as that they are to take veſted intereſts in every ſum of 20*l.*, as it ariſes, for it cannot be confined to any particular ſum, requires an expreſs direction. Every thing is againſt ſurvivorſhip. It is given to them as tenants in common. *Hutcheon* v. *Manning* is a much ſtronger caſe than this. The principle decided by it is, that, where a legacy is given at an indefinite period, the Court will not go upon a nice conſtruction; but will ſay, it veſted at the death of the teſtator. In that caſe the executor could not get any thing by the delay: in this there is a ſtrong temptation to them. The death there could have been aſcertained as well as here; and that will was not confuſed; as this is. Suppoſe, the period extended beyond all the lives, the objects upon this conſtruction would have no benefit. There is great convenience in Lord *Thurlow*'s rule; and a certain rule or principle is much ſafer to property than conjecturing upon words.

June 30. *The Maſter of the Rolls* (*a*)—This bill claims one fifth part of the clear reſidue and ſurplus of the teſtator's eſtate. It is contended on the part of the two defendants, who are the ſurviving reſiduary legatees, that the plaintiffs are only entitled to a fifth of ſo much of the reſidue as accrued during *Forbes*'s life. The doubt ariſes from the teſtator's having in effect made two reſiduary bequeſts. There are two queſtions. 1ſt, What was the intention:

2dly, Whether that intention can be carried into execution: whether it is legal and practicable.

From the whole frame of the will the teſtator appears to have been ſenſible, that a conſiderable time muſt elapſe, before his perſonal eſtate could be got in; and that, until it was collected, which he ſeems to ſuppoſe could not be completely done until his ſon would be of age, the reſidue could not be eſtimated. Making his will under that impreſſion he directs a few legacies to be paid immediately: as to the reſt the diſtribution was to be made, as the property was realized; that is, as it got into the hands of his executors. He gives his reſiduary legatees 500*l.* each in addition to the pecuniary legacies he had before given them. But when he

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(*a*) The judgment *ex relatione*.

gives them the legacies of 500*l.*, he does not name or deſcribe, who they are. But they are to have 500*l.* a-piece at any rate. Afterwards, having made a farther diſpoſition for his ſon and legatees out of what farther ſhall be received or accumulated, he declares, that if any farther ſurplus ſhall be made or ariſe, be it more or leſs, the ſame to go and be equally divided among his reſiduary legatees, or ſuch of them as ſhall be then living. Then he gives away his ſon's legacy in caſe of his death before the age of twenty-one; and of that, ſubject to an additional proviſion for his annuitants, he gives one ninth part to ſuch of his reſiduary legatees as ſhall be then living.

It ſeems to have been his intention therefore, that they, that is, ſuch of them as ſhould be then living, ſhould take whatever was indefinite ſurplus. As to that there is no doubt or ambiguity. He intended, they ſhould take only the firſt pecuniary legacies and the legacies of 500*l.* a-piece abſolutely. The reſt was contingent; and only veſted in them, if living at the time, when the ſurplus aroſe.

That being the intention, it is objected, that though diſtinct and explicit, that intention is not practicable. It is ſaid, the ſurplus ariſes from day to day; and that ſuch a bequeſt is too vague and indefinite to be carried into execution; and for this the caſe of *Hutcheon* v. *Manning* is cited. In that caſe there was nothing, to which the receipt was to be applied. It was to be a bare poſſibility. Lord *Thurlow* ſaid, the teſtator had given no ſtandard, to which the Court was to apply the event, on which the teſtator had given over thoſe legacies; and the claimants there came to deveſt a legacy abſolutely given. They were to make out a caſe, on which it was given over to them. It was, as the Lord Chancellor expreſſed it, an immeaſurable purpoſe. When it might have been received, it was impoſſible to determine. Nothing could be more indefinite. That caſe therefore is clearly diſtinguiſhable; and *Stapleton* v. *Palmer* went off upon another point. Here nothing veſts in the reſiduary legatees, unleſs they are living, when the exiſtence of that ſurplus in their hands is aſcertained; when it is received and accumulated. There can be no difficulty in aſcertaining, when the ſurplus is made; and it might juſt as well have ariſen on a claim of one of the pecuniary legatees; for their dividends are made payable, when there is a fund collected by the executors; and if a pecuniary legatee had claimed ſuch dividends on a given day, he muſt have ſhewn, that there was a fund capable of paying that dividend at the time of the claim; and there could be no difficulty in taking that account. In this caſe the account is not to be taken day by day: but all, that is to be done, is to ſee, how the accounts of the executors ſtand on the day of the death of any one of the deceaſed reſiduary legatees. There is nothing impracticable in that. It is as eaſily done as the account of the debt given in the caſe of *Innes* v. *Mitchell* (*a*); where a debt was given, as it ſtood on a certain day. In the inſtance of the annuitants under this will, that part of the eſtate appropriated to ſecure the annuities veſts in ſuch only of the reſiduary legatees as ſhall be living at the death of the annuitants.

Bequeſt of a debt, as it ſtood on a certain day, good.

It is ſaid, this would make it arbitrary; as the executors might regulate their conduct in collecting the teſtator's debts upon a ſpeculation as to the ſtate of ſome among themſelves. But the whole frame of this will ſhews, that the ſtate of the teſtator's property did not admit of an immediate diſtribution; and the neceſſity of that power aroſe out of the ſituation of his affairs. Is it not to be permitted to a teſtator to poſtpone the veſting of his property, till his funds ſhall be collected? He ſuppoſes, the Court muſt ſuppoſe, till the contrary is ſhewn, that the executors act *bonâ fide*. But had not the teſtator a right to ſay ſo? If the executor might by poſſibility act improperly or arbitrarily, it was the buſineſs of the teſtator to contemplate that poſſibility, and to provide againſt it. But there never was a caſe, in which there was leſs temptation to executors to act improperly; for their own legacies of 500*l.*, veſted abſolutely, would not be paid, till the funds were collected; and they could take no ſurplus, till there was a ſurplus; and it is not here alleged, that there was any unfair conduct of the executors.

Then it is ſaid, the laſt reſiduary clauſe has no effect. That is not ſo; for in the firſt place it names, who are the reſiduary legatees; who were not before named. Next, if they all had died, perhaps the laſt reſiduary clauſe would have given the reſidue to

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(*a*) At the Rolls, *Trin.* Term, 1801. *Poſt.*

the repreſentatives of all of them. But two reſiduary legatees being now living, to take whatever ſurplus ariſes, no ſuch queſtion as that laſt now occurs.

I am therefore of opinion, the plaintiffs are not entitled to one-fifth part of the clear reſidue, which has ariſen; but are entitled only to a fifth of ſo much as had ariſen and was aſcertained at the time of *Forbes*'s death.

GILDENICHI *v.* CHARNOCK.

July 2.

Mr. *Stanley* for the plaintiff moved, that the ſervice of a ſubpœna to anſwer the amended bill upon the Clerk in Court or the ſolicitor of the defendant *Thompſon* may be deemed good ſervice under theſe circumſtances: that defendant had never been ſerved with a ſubpœna; but had appeared upon two motions; that his anſwer would be very important; that he lived abroad, out of the juriſdiction, and would not appear to anſwer.

Lord Chancellor aſked, whether it ſhould be abſolute in the firſt inſtance: but upon the allegation, that he could not be ſerved with the order *niſi*, his Lordſhip granted the motion.

Order, that ſervice of ſubpœna to anſwer the amended bill upon the Clerk in Court or Solicitor may be good ſervice upon the ſpecial circumſtances; that though he had not been ſerved with a ſubpœna, he had appeared on two motions; that his anſwer would be very important; that he lived abroad out of the juriſdiction; and would not appear, to anſwer.

———— *v.* LAKE.

(*a*) *June* 25. *July* 2.

Upon a bill of foreclosure Mr. *Bell* for the defendant moved, that the defendant might be at liberty to put in his anſwer without oath; and that the Six Clerk may receive it, though not ſigned by him; upon the circumſtances, that the defendant, who was an officer in the army, had ſailed for India under orders im-

Under ſpecial circumſtances and by conſent the Six Clerk was directed to receive the anſwer to a bill of foreclosure, though not ſigned by the defendant.

(*a*) The laſt day of Term being Midſummer Day, the motions were heard at *Weſtminſter Hall* on the following day.

mediately after ſervice of the ſubpœna and appearance, and before he had time to put in his anſwer.

Lord CHANCELLOR would not make the order; obſerving, that he had a right in ſuch a caſe to a commiſſion; and that upon a bill of foreclosure the delay is an advantage to the defendant.

Afterwards a motion was made in the alternative; either, that a commiſſion might iſſue; or, that the Six Clerk may be at liberty to take the anſwer without oath, though not ſigned by the defendant.

Mr. *Richards* for the plaintiff ſaid, he was very deſirous, that the anſwer might be put in in this way. The plaintiff was anxious to obtain a decree for a foreclosure: the money being conſiderable and the ſecurity ſmall; but it was of great conſequence to the defendant to keep the eſtate. He certainly does not go abroad to avoid the proceſs.

Lord CHANCELLOR—Then in this particular caſe upon the conſent of the plaintiff the Six Clerk muſt be directed to receive the anſwer without being ſigned by the defendant.

Ordered.

July 2.

KING *v.* KING.

Injunction, reſtraining a transfer, and a receiver appointed, to preserve the property during a litigation in the Eccleſiaſtical Court upon the will.

OPPOSITE claims had been ſet up in the Eccleſiaſtical Court under different wills; and a deciſion had been made; that one will was not ſufficiently proved.

Mr. *Benyon* for the plaintiff moved, that the property might be paid into the Bank, and transferred to the Accountant General; and a receiver appointed to collect the outſtanding property. The motion was made on the authority of *Mitford* (a); that during a ſuit in the Eccleſiaſtical Court for adminiſtration of the effects a Court of Equity will entertain a ſuit for the mere preſervation of the property, till the litigation is determined. It was ſaid, that Lord *Thurlow* had directed, that the party ſhould be examined upon interrogatories.

(a) *Mitſ.* 122, 123.

Mr. *Mansfield* for the defendant objected, that it did not appear the property was in danger; obſerving, that the deciſion was not ſatisfactory; and the Eccleſiaſtical Court might receive farther evidence; and the proper courſe would be, that an adminiſtrator *pendente lite* ſhould be appointed by the Eccleſiaſtical Court.

Lord CHANCELLOR—This is almoſt a motion of courſe. There is no doubt, this Court has appointed a Receiver, when it has been in diſpute, who was the perſonal repreſentative; where the matter is in controverſy in the Spiritual Court; as whether there is an inteſtacy, or not. The Court goes upon this; that it will do its beſt to collect the effects. The property is in danger in this ſenſe; that it may get into the hands of perſons, who have nothing to do with it. That he may be examined upon interrogatories is not part of the motion. Let him transfer the funds to the Accountant General according to the notice of motion; and a Receiver muſt be appointed.

Mr. *Piggott* (*Amicus Curiæ*) obſerving, that no one could transfer, the order made was, that the defendant ſhould be reſtrained from transferring any ſtock or dividends ſtanding in the name of the teſtator, or ſtanding in his own name, that belonged to the teſtator; and that a Receiver ſhould be appointed.

May 8.
June 9.
July 6.

EVANS *v.* BICKNELL.

Bill to charge a truſtee, as having by delivering the title deeds to the tenant for life enabled him to make a mortgage of a ſettled eſtate as tenant in fee, diſmiſſed; the fraudulent purpoſe of enabling him to mortgage reſting upon the evidence of a ſingle witneſs, and being poſitively denied by the anſwer; as far as the allegations of the bill gave an opportunity of anſwering; but without coſts, on the ground of negligence; and without prejudice to an action; and with an option to the plaintiff to take an iſſue.

By indentures of leaſe and releaſe, dated the 8th and 9th of *September* 1792, *William Stanſell*, a biſcuit baker at *Briſtol*, conveyed to *Elizabeth Reed*, alſo of *Briſtol*, her heirs, executors, adminiſtrators, and aſſigns, reſpectively, certain freehold and leaſehold eſtates, by way of mortgage for the ſum of 300*l.*; and it was provided, that *Hawkins*, an attorney, was to receive the rents and profits; and to apply them in the firſt inſtance to the intereſt, and then to accumulate them for the diſcharge of the principal. At the date of the mortgage the only intereſt *Stanſell* had in theſe eſtates was under a ſettlement, executed in *November* 1785, previous to his marriage with *Elizabeth Bicknell*; by which all the ſaid leaſehold and freehold eſtates were aſſigned and conveyed to *John Bicknell*, and *John Taylor*, their executors and adminiſtrators, and heirs and aſſigns, reſpectively; upon truſt for the ſeparate uſe of *Elizabeth Bicknell* for life; remainder to the uſe of *Stanſell* for life; remainder to the children, as he ſhould appoint, and, in default of appointment equally; with a reverſionary intereſt to *Stanſell* in default of children. They had iſſue two children. Afterwards, two or three years before the mortgage, *Stanſell* became inſolvent; and ſeparated from his wife.

Elizabeth Reed having married *Evans*, the bill was filed by them; ſtating theſe circumſtances; and that the real title of *Stanſell* had been diſcovered ſince the mortgage; that all the title deeds had been upon the marriage delivered to *Bicknell*, the truſtee; and charging a deſign to raiſe money upon the credit of the premiſes; and that *Bicknell* delivered the deeds out of his cuſtody for the purpoſe of enabling *Stanſell* to repreſent himſelf to the plaintiff to be the owner of the premiſes; that he has admitted or declared upon different occaſions and in the hearing of different perſons, and that *Stanſell* at the time of the application informed him, he wanted them for the purpoſe of obtaining credit; and he made ſuch declaration or admiſſion in the preſence of the plaintiff and *Hawkins*, the Solicitor, and the defendant *Taylor*. The bill prayed, that the eſtates may be ſold to ſatiſfy the mortgage; and that the defendant *Bicknell* ſhould be decreed to anſwer the deficiency, or the whole, if the Court ſhould be of opinion, that the eſtate ſhould not be ſold.

The defendant *Bicknell* by his anſwer ſtated, that *Stanſell* ſome years after the execution of the ſettlement, and prior to the execution of the mortgage, became inſolvent; and aſſigned all his eſtate for the benefit of his creditors; which was a matter of notoriety in *Briſtol*; and advertiſements were inſerted in the *Briſtol* newſpapers. The title deeds were ſoon after the execution and previous to the marriage delivered by *Stanſell* to the defendant *Bicknell*; and remained in his cuſtody, till they were delivered by him to *Stanſell* a ſhort time previous to the mortgage; when all the title deeds except the ſaid ſettlement were delivered at the deſire and with the approbation of *Elizabeth Stanſell* to the defendant *William Stanſell*; who promiſed to redeliver them in a few hours, or next morning at the fartheſt. Upon the defendant's application afterwards *Elizabeth Stanſell* admitted, ſhe had them; but refuſed to part with them. He denied, that the delivery was to enable him to obtain a mortgage from the plaintiff or any one; and ſtated, that he never did admit or declare, in the preſence of *Hawkins*, *Taylor*, or any other perſon, nor did *Stanſell*, when he applied for the deeds, or at any time, inform him, that he wanted to obtain money by way of mortgage or otherwiſe: but he admitted, *Stanſell* did inform him, he wanted the uſe of the title deeds merely to ſhew or convince ſome perſon or perſons, with whom he was in the habit of taking credit in the way of trade, that he and his wife were legally in poſſeſſion of the rents and profits of the freehold and leaſehold eſtates.

The defendant *John Taylor*, after the anſwer of *Bicknell* was put in, was examined by the plaintiffs; and by his depoſitions he ſtated, that upon the 29th of *January* 1794 *Elizabeth Evans* and *Hawkins*, the attorney, came to him about the mortgage; and they and the deponent went to *Bicknell*; who, ſtrenuouſly denied, that he had delivered the deeds for the purpoſe of a mortgage; but at length, after much altercation and abuſive language between him and *Hawkins*, informed them, that *Stanſell* had deſired him to lend him the title deeds, belonging to the marriage ſettlement, to ſhew to ſome perſon; who would credit him with goods in his trade to the amount of 40*l.* or 50*l.* upon ſeeing them; and the perſon to lend the money was to receive two years' rents; that he had promiſed to return them in an hour; that he (*Bicknell*) had lent them; and had often ſent, but never could get them; and he denied, that he knew of the mortgage.

Hawkins died, before the cauſe went to iſſue.

The Lord Chancellor early in the argument put it to the plaintiff's Counſel, whether they could not bring an action.

Mr. Romilly and Mr. Hart for the plaintiffs—With reſpect to your Lordſhip's queſtion, whether the plaintiffs may not bring an action, they are not entitled to relief at law, upon the principles, upon which *Paſley* v. *Freeman* (*a*) and *Scott* v. *Lara* (*b*) were determined. In this caſe there is no privity between *Bicknell* and the plaintiff; no Aſſumpſit or contract.

It is unneceſſary to ſay, what the Court has done in the caſe of a firſt mortgagee leaving the deeds in the hands of a mortgagor. *Bicknell* had in himſelf the fee ſimple in the freehold eſtate and the abſolute intereſt in the terms for years. Giving the deeds to *Stanſell*, enabling him to act as abſolute owner, *Bicknell* muſt be anſwerable for all the conſequences, as much as if they had followed from his own act. He knew, *Stanſell* intended to gain a credit upon theſe deeds; as he thought, only to the extent of 50*l.*, according to the witneſs: but his anſwer does not ſtate the extent. The plaintiff is entitled to the whole of the money advanced, not merely the 50*l.*; ſuppoſing that ſum the extent of the fraud intended. The principle of law upon that is ſtated by Lord *Bacon* (*c*), that a party enabling another to commit a fraud muſt be anſwerable for all the conſequences. Mr. Juſtice *Foſter* (*d*), treating upon accomplices, puts ſeveral caſes upon it. In the caſes of marriage agreements, where the huſband has been repreſented to be in good circumſtances, the party making that falſe repreſentation has been held anſwerable out of his own property. In one caſe, *Arnot* v. *Biſcoe* (*e*), which is not to be diſtinguiſhed from this, a perfect ſtranger was compelled to pay the loſs out of

(*a*) 3 *Term Rep. B. R.* 51. (*b*) *Peake N. P.* 226. (*c*) *Maxim* 16, fol. 82.
(*d*) *Foſt. C. L.* 370. (*e*) 1 *Veſ.* 95.

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his own pocket. The circumſtance, that the defendant in that caſe was an attorney, cannot make any difference. This defendant is a truſtee; and his duty was not to let thoſe deeds go out of his hands. There is no material contradiction between the anſwer and the evidence. The rule (*a*), that there can be no decree upon the evidence of a ſingle witneſs againſt the anſwer, prevails only, where the denial by the anſwer is poſitive; but in this caſe the anſwer alone would be a ſufficient foundation for the decree. The only inſtance, in which a decree has not been made againſt the defendant to ſuch a bill, is the caſe of the *Thatched Houſe* Tavern (*b*); the repreſentation being, that the object being to build, the mortgagee by parting with the deeds for an hour would improve his ſecurity; and he would not truſt the deeds with the mortgagor; but went with him; and ſtaid in his houſe, while they were in his poſſeſſion. The juriſdiction of this Court would be very defective, if it cannot from the acts of parties infer a fraud; not relying only upon the admiſſion. This truſtee had the deeds in his poſſeſſion for a double purpoſe; to protect the title; and for the general purpoſe of protecting the public from frauds, that might be committed by means of them. Suppoſing, as the Court has intimated, that the caſes do not go the length of poſtponing a firſt mortgagee, who has parted with the deeds, upon mere negligence, this is more than negligence. In *Beckett* v. *Cordley* (*c*) the Lord Chancellor lays it down (*d*), that though there is no caſe in the books, but where the party, to whom the fraud is imputed, was conuſant of the treaty, in which it was practiſed, yet, if it appeared, the parties were confederating together to cheat ſome one, though the particular perſon was not known, the caſe would fall within the ſame principle; and muſt receive the ſame determination. What poſſible purpoſe could there be in this tranſaction but the purpoſe ſuppoſed, and admitted by the defendant, to convince ſome innocent perſon, that *Stanſell* and his wife were in the legal poſſeſſion of the rents and profits of theſe eſtates, and to induce that perſon to give him a credit, which he would not otherwiſe have given? Though there is no caſe exactly in point, yet upon the principles, on

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(*a*) *Walton* v. *Hobbs*, 2 *Atk.* 19. and the references. *Mortimer* v. *Orchard*, *ante*, vol. 2. 243. *Cooth* v. *Jackſon*, *ante*, 12.

(*b*) *Peter* v. *Ruſſel*, 1 *Eq. Ca. Ab.* 321.

(*c*) 1 *Bro. C. C.* 353.

(*d*) 1 *Bro. C. C.* 357.

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which *Arnot* v. *Biſcoe* and the other caſes were determined the plaintiffs are entitled to a decree.

Mr. Richards and Mr. Horne for the defendant Bicknell—The bill as againſt *Bicknell* is merely an action for 300 *l.* It is impoſſible upon this bill to arrange any equity as againſt *Stanſell.* It is merely an action on the caſe, in the nature of an action of deceit. Where is the equity any more than againſt an obligee in a bond ſuing the ſurety in this Court; the principal being inſolvent? It is ſaid, there muſt be relief ſome where; and if it cannot be had at law, upon *Paſley* v. *Freeman*, it muſt be in this Court: but Courts of law do take notice of perſonal frauds; and if they will not give relief upon this caſe, it is only becauſe upon ſound principles they will not act on ſuch a looſe ground. This would bring every action of a perſonal nature founded in fraud into this Court.

But, ſuppoſing, the caſe was at law, there is no pretence for ſuſtaining an action. They in truth admit, they have no remedy at law. *Arnot* v. *Biſcoe* and the other caſes referred to are quite different; and that of the *Thatched Houſe* Tavern is very ſtrong: the deed being given up by the mortgagee, he ought to have ſeen, what uſe was to be made of it: yet the Court ſeeing no intention to defraud would not affect him. *Mocatta* v. *Murgotrayd* (*a*) was determined upon the implied conſent of the mortgagee to be poſtponed. *Ibbotſon* v. *Rhodes* (*b*) was a caſe of fraud. *Berrisford* v. *Milward* (*c*) was a caſe, either of clear fraud, or, in which the party was bound by his own undertaking not to look to the mortgaged eſtate, but to look upon the father as his perſonal debtor. *Head* v. *Egerton* (*d*) proceeds upon the ground, that the firſt mortgagee had beyond all doubt a right to keep his mortgage. Thoſe caſes therefore afford no ground for ſaying, the mere abſence of the title deeds affects the mortgagee; unleſs fraud is imputed to him. The caſe of the remainder man, cited (*e*) in *Arnot* v. *Biſcoe*, is a ſtrong caſe of fraud; the repreſentation being, that a perſon, in fact only tenant in tail, had a title to make a mortgage in fee. In *Plumb* v. *Fluitt* (*f*) the ge-

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(*a*) 1 *P. Will.* 393.
(*b*) 2 *Vern.* 554.
(*c*) 2 *Atk.* 49.
(*d*) 3 *P. Will.* 280.
(*e*) 1 *Veſ.* 96.
(*f*) 2 *Anſt.* 432.

neral purpoſe of deceiving the world is ſtated. As to the caſes of a felonious intention to murder one perſon, in purſuance of which by accident another is killed, they cannot be applied to a tranſaction of this ſort, having nothing in it felonious or criminal. According to an accurate note of *Beckett* v. *Cordley* Lord *Thurlow* ſays, *Hobbs* v. *Norton* (*a*) was a very ſtrong caſe: but the defendant treated with the very party, to whom fraud was imputed; and there is no caſe, in which the Court has gone upon any other ground, than the party's being conuſant of the tranſaction: to be ſure if parties enter into a confederacy together, and are conuſant of the general purpoſe, it is not neceſſary to ſhew an intent to cheat a particular perſon: but if they are conuſant of the general purpoſe, it is brought to the ſame point.

There is nothing in this caſe to ſhew ſuch a general purpoſe of fraud. There was only one perſon willing to advance money, if *Stanſell* was entitled to the poſſeſſion of the premiſes. He was entitled ſufficiently for that purpoſe. Notwithſtanding the artifice of endeavouring in a converſation to draw ſomething from the defendant by irritating him, an attorney being brought, to take advantage of any thing, that could be drawn from him, they are forced to admit, that he ſtrenuouſly denied the purpoſe imputed to him. His retaining the ſettlement affords no inference, that he meant fraud: *Stanſell* and his wife having another part. This caſe is admitted to be new in principle. The maxim of Lord *Bacon* referred to amounts only to this; that a man ſhall not take advantage of his own wrong, as a general propoſition: but they muſt prove an unlawful intention. If the defendant denies the charge, the plaintiff cannot have a decree upon the evidence of one witneſs; unleſs there are unequivocal circumſtances corroborating the evidence; and in this caſe the circumſtances, inſtead of corroborating, afford an inference the other way. They all lived in *Briſtol*; and therefore notice muſt be preſumed.

Lord Chancellor—It is ſtill for the conſideration of the plaintiff's Counſel, whether an action may not be maintained at law; for if upon their ſtate of the caſe this Court can interfere, I doubt very much, whether an action might not be main-

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(*a*) 1 *Vern.* 136.

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tained. Then this is in truth a ſuit in a court of equity for damages. This defendant has got the legal eſtate in the freehold and leaſehold; but in both upon a truſt for perſons, whom you do not affect. If one *Ceſtuy que* truſt has acted honeſtly, can the Court take away the eſtate, becauſe the other has acted diſhoneſtly. I do not mean at preſent to ſay, that if an action can be maintained, therefore this Court will not maintain its juriſdiction, executed perhaps upon much more correct principles; for Courts of law have taken very ſtrong ſteps.

Mr. Romilly in reply.—The relief ſought is a compenſation in money; as in *Arnot* v. *Biſcoe*. If they rely upon notice of the ſettlement by the plaintiff, they ought to have put that in iſſue: not having done ſo, they can neither give direct evidence of it, nor raiſe an inference. The bill does not even ſuggeſt notice. But that fact was in iſſue in a cauſe inſtituted by Mrs. *Stanſell* againſt this plaintiff and the two truſtees; expreſſly charging, that the plaintiff had notice; which was denied by the anſwer. Some of your Lordſhip's predeceſſors have lamented, that the Court had gone ſo far in affecting a principal by notice to an agent. Can the Court now ſay, for what fair purpoſe the defendant gave up theſe deeds to this inſolvent debtor? The maxim from Lord *Bacon* was referred to only to ſhew, that the purpoſe being illegal, the party could not ſay, he was not to anſwer; becauſe the other had exceeded the intention; and various inſtances of that nature are put. How can all the world be ſuppoſed to have had notice of the inſolvency of an obſcure tradeſman in *Briſtol*?

With reſpect to the ſuppoſed relief at law, there is no inſtance of ſuch an action: nor can it be ſupported upon any principle. *Paſley* v. *Freeman* and *Eyre* v. *Dunford* (*a*) are the only caſes, that have the leaſt analogy; and it is very doubtful, whether they would bear out this caſe. Courts of law have carried the principle farther than Courts of equity. No form of action is provided; and that is an objection to our going to law. The objection, that relief might be had at law was of much more force in *Arnot* v. *Biſcoe*. But at leaſt there is a concurrent juriſdiction; and a Court of equity ought to interfere upon a caſe of groſs

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(*a*) 1 *Eaſt*. 318.

fraud; in which it is impoſſible to aſſign a good motive. The ground in this Court is, that this man, having the legal eſtate and a depoſit of the title deeds, enables another perſon to deal with the eſtate, as he himſelf might have done; to make a mortgage; which, if done by himſelf, would have made him clearly anſwerable.

Lord CHANCELLOR—Though the ſum, which is the ſubject in queſtion, is ſmall, a cauſe of more conſequence to the public has very ſeldom been heard.

Lord CHANCELLOR ſtated the caſe; and delivered his judgment.

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There is a peculiarity in this mortgage; from the circumſtance, that *Hawkins*, the attorney, was appointed to receive the rents and profits; and to apply them in the firſt inſtance to the intereſt, and then to accumulate them for the diſcharge of the principal: ſo that it is in fact a mortgage aiming at the delivery of poſſeſſion immediately to the mortgagee; to the intent to repay the money lent by the rents and profits, as ſoon as poſſible. Though that circumſtance is a peculiarity, it is not a circumſtance preſſing at all upon the application of any principle, that ought otherwiſe to diſpoſe of the caſe. The queſtion in this cauſe is, whether upon the doctrine of this Court the defendant *Bicknell* is liable to make good the deficiency to the plaintiff upon this tranſaction beyond the value of *Stanſell's* intereſt under the ſettlement; which would be the firſt to be applied. The bill contended at firſt, that this was a groſs fraud on the part of the wife; that ſhe was privy to all the circumſtances, under which her huſband obtained the loan; and gave poſitive encouragement to the party lending; an allegation, which, if made out, would be ſufficient to poſtpone her to the mortgagee; for coverture is no excuſe for fraud. Upon her anſwer however and the evidence it is not now, nor can it be, contended, that there was upon her part either diſtinct fraud, or that groſs degree of negligence, which this Court looks at as fraud with regard to the conſequences attaching to it. Therefore her eſtate, ſo far as it depends upon her own act, appears ſecure to her. The bill then fails altogether as a bill requiring a conveyance from any of the defendants to make good the plaintiff's title. From her there can be no conveyance: her eſtate being ſettled to her ſeparate uſe, and protected by the legal eſtate of *Taylor* and *Bicknell:* the former ſo little implicated in the fraud or negligence, that he was examined as a witneſs; and therefore it is impoſſible to affect his eſtate, protecting her's; and if *Bicknell* was the ſole truſtee, it is much too ſtrong to ſay, this married woman, *ceſtuy que* truſt, ſhould be deprived of her intereſt, though an innocent party; becauſe there might have been fraud or negligence in *Bicknell;* in whom the legal eſtate was. Her equity to be protected would be as ſtrong as the plaintiffs' to have their eſtate made good. The Court, if it ſtood indifferent upon ſuch a caſe, would have acted upon its uſual principles.

The queſtion then is, ſuppoſing the huſband's intereſt inſufficient to ſatisfy the mortgage, whether there is a perſonal demand againſt *Bicknell* upon the circumſtances of his conduct; and whether, if there is, it can be enforced in a Court of equity. I ſhall diſpoſe of the laſt conſideration firſt. If there is a juriſdiction at law in ſuch caſes, there is alſo a juriſdiction in equity; and then, if there is a concurrent juriſdiction, there can be no reaſon for diſmiſſing the bill. Attending to the caſes decided at law, there can be very little doubt, that a declaration might be framed upon the circumſtances of this caſe, ſo that an action might be maintained, if there be fraud in the conduct of *Bicknell:* but it will not follow, that this Court cannot give relief. *Paſley* v. *Freeman,* which is the firſt caſe of its kind, proceeded upon this ground; that the defendant was averred by the declaration to have falſely, deceitfully, and fraudulently, aſſerted, that *Falch* was ſafely to be truſted. The action was maintained upon the ground of fraud and deceit in the defendant and damage to the plaintiff; circumſtances, which were held by a majority of the Judges ſufficient to maintain the action. It has occurred to me, that that caſe upon the principles of many deciſions in this Court might have been maintained here; for it is a very old head of

An old head of Equity, that if a repreſentation is made to a man, going to deal on the faith of it in a matter of intereſt, the perſon making the repreſentation, knowing it falſe, ſhall make it good; and the juriſdiction aſſumed by Courts of Law in ſuch caſes will not prevent relief in Equity.

equity, that if a repreſentation is made to another perſon, going to deal in a matter of intereſt upon the faith of that repreſentation, the former ſhall make that repreſentation good, if he knows it to be falſe; and in that caſe and ſome others there appears a diſpoſition to hold, that if there was relief to be adminiſtered in equity, there ought to be relief at law: a propoſition, that ſeems to me exceſſively queſtionable; and I doubt, whether it is not founded in pure ignorance of the conſtitution and doctrine of this Court. I allude to it the rather on account of a caſe frequently mentioned, *Goodtitle* v. *Morgan* (*a*); in which Mr. Juſtice *Buller* expreſſes himſelf in this manner (*b*):

"It is an eſtabliſhed rule in a Court of Equity, that a ſecond "mortgagee, who has the title deeds, without notice of any prior "incumbrance, ſhall be preferred; becauſe, if a mortgagee lends "money upon mortgage without taking the title deeds, he enables "the mortgagor to commit a fraud. If this has become a rule of "property in a Court of Equity, it ought to be adopted in a "Court of Law. Here the defendants took mortgages without "inquiring after the title deeds: the ſubſequent mortgagee is a "purchaſer without notice; and as he has taken the title deeds, "he has the better title."

Not a general rule in Equity, that a ſecond mortgagee, who has the title deeds, without notice of a prior incumbrance, ſhall be preferred: negligence alone will not poſtpone the firſt: it muſt amount to fraud.

The firſt of theſe propoſitions is certainly upon the late deciſions not true. I do not wonder, that Mr. Juſtice *Buller* ſtated the doctrine, as he did; for in *Ryall* v. *Rowles* (*c*) it is ſo ſtated by Mr. Juſtice *Burnet* (*d*), and without obſervation by the Lord Chancellor, or the other learned perſons, by whom his Lordſhip was aſſiſted, as being contrary to the law of this Court; and in *Beckett* v. *Cordley*, in which I was Counſel with Mr. *Ambler*, who had a good memory of that time, he certainly was impreſſed with a full conviction, that that was the doctrine of this Court.

With regard to the ſecond propoſition of Mr. Juſtice *Buller*, that, if this had become a rule of property in equity, therefore it

A rule of property in Equity is not therefore to be adopted at Law: the Courts in ſome reſpects proceeding upon different principles: Courts of Equity for inſtance not allowing a ſingle witneſs, unleſs ſupported by circumſtances, to prevail againſt a poſitive denial by the anſwer.

(*a*) 1 *Term Rep. B. R.* 755.

(*b*) 1 *Term Rep. B. R.* 762.

(*c*) 1 *Veſ.* 348. 375. 1 *Atk.* 165.

(*d*) 1 *Veſ.* 360. 1 *Atk.* 168.

ought to be adopted in a Court of Law, with great deference to the learning and memory of that Judge that appears to me a very haſty propoſition; and the converſe undoubtedly will not hold; for it is impoſſible for this Court upon the principles, upon which it acts, to ſay, that whatever is a rule of proceeding at Law is of courſe a rule of proceeding in Equity. It may be aſſerted, that it ſhould be the caſe: but it is impoſſible it can. For inſtance: in the caſe of the mortgagee, put in *Paſley* v. *Freeman*, if the man makes a falſe declaration, and an action can be maintained upon that, and the principle, upon which it can be maintained, is, that a Court of Equity will relieve, the converſe ought to hold; that, where an action can be maintained, Equity ſhould give relief. But is that ſo? A defendant in this Court has the protection ariſing from his own conſcience in a degree, in which the law does not affect to give him protection. If he poſitively, plainly, and preciſely, denies the aſſertion, and one witneſs only proves it as poſitively, clearly, and preciſely; as it is denied, and there is no circumſtance, attaching credit to the aſſertion overbalancing the credit due to the denial, as a poſitive denial, a Court of Equity will not act upon the teſtimony of that witneſs. Not ſo at Law. There the defendant is not heard. One witneſs proves the caſe; and, however ſtrongly the defendant may be inclined to deny it upon oath, there muſt be a recovery againſt him.

It ſeems to me rather ſurpriſing, if I may preſume to ſay ſo, that Lord *Manſfield*, who concurred with Mr. Juſtice *Buller* in a great many of theſe equitable principles in a Court of Law, ſhould not have attended to theſe diſtinctions; which perhaps will be found in the very principles, upon which this Court exiſts. Titles to property may poſſibly be found to be very conſiderably ſhaken by the doctrine of the Court of *King's Bench* as to ſatisfied terms (*a*). The law as to that here is, that a ſecond mortgagee having no notice of the firſt mortgage, if he can get in a ſatisfied term, would do that, which is the true ground of the deciſion,

In equity a ſecond mortgagee without notice getting in a ſatisfied term may protect himſelf: the conſcience being equal.

The Lord Chancellor of opinion, that at Law an aſſignment of ſuch term is not to be preſumed, without ſome dealing upon it. Conſequences of the late doctrine of Courts of Law on this ſubject.

(*a*) See *Doe* on the demiſe of *Briſtowe* v. *Pegge*, 1 *Term Rep. B. R.* 758. *n*. *Doe* on the demiſe of *Hodſden* v. *Staple*, 2 *Term Rep. B. R.* 684. *Doe* on the demiſe of *Da Coſta* v. *Wharton*, 8 *Term Rep. B. R.* 2.

though it is not put upon that by Mr. Juſtice *Buller*: he would, as in conſcience he might, get the legal eſtate; and by virtue of that protect his eſtate againſt the firſt mortgagee, having got a prior title; the conſcience being equal between the parties. When once it is ſaid at law, that a ſatisfied term ſhould not be ſet up in an ejectment, the whole ſecurity of that title is deſtroyed; and therefore even with the modern correction that doctrine has received in the late caſes, which is, that you may ſet up the term, though ſatisfied, and put it as a queſtion to the Jury, whether an aſſignment is to be preſumed, it ſeems to me very dangerous between purchaſers; and the leaning of the Court ought to be, that it was not aſſigned; and I fully concur with Lord *Kenyon*, that it is not fit for a Judge to tell a Jury, they are to preſume a term aſſigned, becauſe it is ſatisfied: but there ought to be ſome dealing upon it: or you take from a purchaſer the effect of his diligence in having got in the legal eſtate; to the benefit of which he is entitled. Then, ſuppoſe, the law takes upon itſelf to decide the queſtion between purchaſers upon this ſubject: can it decide upon the ſame rules as Courts of Equity, as upon the queſtion of notice? It will be ſaid upon this doctrine, a Court of Equity does inquire into this; and it is a rule of property in Equity; and therefore ought to be a rule of property at Law. But, how has it become a rule of property in Equity? In Equity the firſt mortgagee may aſk the ſecond, whether he had notice. If that defendant poſitively denies notice, and one witneſs only is produced to the fact of notice, if the denial is as poſitive as the aſſertion, and there is nothing more in the caſe, a Court of Equity will not take the benefit of the term from the ſecond mortgagee; placing as much reliance on the conſcience of the defendant as on the teſtimony of a ſingle witneſs; without ſome circumſtances attaching a ſuperior degree of credit to the latter (*a*). It is impoſſible

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(*a*) This rule, conſidered ſimply as a general rule of evidence, ſeems open to obſervation; 1ſt, as preferring the evidence of a party; 2dly, upon the obvious defect of written, compared with oral, teſtimony. It is difficult to determine the balance of inconvenience and danger, on the one hand, from permitting in a commercial country the defendant to avail himſelf of his own oath to a degree in ſome reſpects beyond the old wager of Law; and on the other, from deciding upon the evidence of a ſingle witneſs, in caſes even, requiring the utmoſt accuracy and preciſion in the proof.

In *Haycraft* v. *Creaſy*, 2 *Eaſt*. 92, an attempt was made to extend the doctrine of *Paſley* v. *Freeman* to a caſe, in which the defendant could not be affected with fraud; having given the character under a falſe impreſſion; in conſequence of which he had ſuſtained a conſiderable loſs: but three Judges of the Court of *King's Bench* decided, againſt the opinion of Lord *Kenyon*, that fraud is the ground of this action.

therefore,

therefore, that the rule of property can be ſaid to be the ſame as at law; and if it ſtands upon different principles, in fact it is perfectly different.

Conſequences of permitting an action for an injury ſuſtained by giving credit upon a falſe repreſentation by the defendant.

So, as to the caſe of *Paſley* v. *Freeman*. It is almoſt improper at this day to ſay any thing, having a tendency to ſhake it: but I know Mr. Juſtice *Groſe* very lately held the ſame opinion as he did at the time of the judgment. The doctrine laid down in that caſe is in practice and experience moſt dangerous. I ſtate that upon my own experience; and if the action is to be maintained in oppoſition to the poſitive denial of the defendant againſt the ſtout aſſertion of a ſingle witneſs, where the leaſt deviation in the account of the converſation varies the whole, it will become neceſſary, in order to protect men from the conſequences, that the Statute of frauds (*a*) ſhould be applied to that caſe. Suppoſe, a a man aſked, whether a third perſon may be truſted, anſwers, "You may truſt him; and if he does not pay you, I will." Upon that the plaintiff cannot recover; becauſe it is a verbal undertaking for the debt of another. But if he does not undertake, but ſimply anſwers, "You may truſt him: he is a very "honeſt man, and worthy of truſt," *&c.* then an action will lie. Whether it is fit the law ſhould remain with ſuch diſtinctions, it is not for me to determine. Upon the caſe of *Paſley* v. *Freeman* I have always ſaid, when I was Chief Juſtice, that I ſo far doubted the principles of it, as to make it not unfit to offer, as I always did, to the Counſel, that a ſpecial verdict ſhould be taken: but that offer was ſo uniformly rejected, that I ſuppoſe I was in ſome error upon this ſubject. I could therefore only point out to the Jury the danger of finding verdicts upon ſuch principles; and I ſucceeded in impreſſing them with a ſenſe of that danger ſo far, that the plaintiffs in ſuch actions very ſeldom obtained verdicts. It appears to me a very extraordinary ſtate of the law, that if the plaintiff in the caſe of *Paſley* v. *Freeman* had come into equity, inſiſting, that the defendant ſhould make good the conſequence of his repreſentation, and the defendant poſitively denied, that he had made that repreſentation, and only one witneſs was produced to prove it, the Court of Equity would give the defendant ſo much protection, that they would refuſe the relief; and yet upon the very ſame circumſtances the law would enable the plaintiff to

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(*a*) 29 Ch. 2. c. 3.

recover. Whether that is following equity, or not quite outſtripping equity, is not a queſtion for diſcuſſion now: but it leads to the abſolute neceſſity of affording protection by a ſtatute, requiring, that theſe undertakings ſhall be in writing.

With regard to the circumſtances of this caſe, this is an amended bill; and I do not know, but I rather ſuſpect from the frame of the bill and the nature of the anſwer, that this was an after-thought: but ſtill the plaintiff muſt have the relief, if it is founded. The bill at firſt muſt have gone upon the ground of fraud in the wife. Her anſwer removes all poſſibility of charging her eſtate with the mortgage; and then the bill ſuggeſting pretences by *Bicknell*, that he was a ſtranger to the application of *Stanſell* to the plaintiff to lend him the money, and did not know, what uſe *Stanſell* intended to make of the deeds, charged, that *Bicknell* delivered the deeds for the expreſs purpoſe of enabling *Stanſell* to repreſent himſelf to the plaintiff to be the owner of the premiſes; and that *Bicknell* has admitted or declared upon different occaſions and in the hearing of different perſons, that *Stanſell* at the time of the application informed him, that he wanted them for the purpoſe of obtaining credit; and made ſuch declaration or admiſſion in the preſence of the plaintiff and *Hawkins*, the ſolicitor, and the defendant *Taylor*; and inſiſts, that *Bicknell* having enabled *Stanſell* to practiſe ſuch fraud he ought to pay the plaintiff whatever ſum ſhe may loſe by thoſe means. If the purpoſe imputed by this charge was proved, it would be ſufficient to maintain the bill.

Next, the admiſſion, that he ſaid he wanted them to enable him to obtain credit from ſome perſon or perſons, admits a variety of conſtructions. Firſt, if he was about to borrow the money, the perſon, to whom he applied, might have conſented to lend it; if ſatisfied, that the eſtate was in his family. On the other hand it might be, that he wanted by means of the title deeds to obtain credit by repreſenting himſelf as owner of the premiſes. It is neceſſary therefore to conſider very accurately what it muſt be taken to mean; regard being had to what the defendant ſays in his anſwer; who in this Court has the benefit of his own conſcience, and to what it proved in evidence. Having in his firſt anſwer ſtated, that he knew nothing of the purpoſe to make a

mortgage,

mortgage, by his ſecond anſwer he poſitively denies, that the delivery to *Stanſell* was to enable him to obtain a mortgage. The reſult of the anſwer is, that he knew, *Stanſell* was covered with inſolvency; which was notorious in *Briſtol*; and that *Stanſell* ſuggeſted to him, that for the purpoſe of his trade he could obtain a credit in the way of his trade, if he could ſhew, that he and his wife had a title to that property; and for that reaſon *Bicknell* parted with the deeds. It is to be remembered, he retained the ſettlement: but I take the fact now to be, that the counterpart was in the hands of the huſband or the wife (*a*). Therefore he delivered the deeds to thoſe, who had the ſettlement; and retained that part, I preſume, as evidence of his claim to have back the title deeds. It is not the caſe therefore of a perſon delivering them to another; who had not in his hands, that, which would ſhew the real nature of the title; but to one, who acting honeſtly would produce that ſettlement. It was to a certain degree truſting to his honeſty as to that: but it varies the ſtate of the caſe; where a party is to be charged upon the ground of fraud, or negligence ſo groſs as to be evidence of an intention of fraud. If *Hawkins* was living, he might have given an account, that would have removed all doubt: but it might have been favourable to the defendant; and if there is a doubt upon the reſult, that is a circumſtance the Court muſt deal with as well as they can. I am a little ſtruck with the circumſtance, firſt, that in the mortgage of the freehold eſtate the wife was not made a party with regard to her dower; alſo, with the peculiarity, that the perſon lending the money by *Hawkins*, the attorney, bargains for the poſſeſſion of the eſtate; to the intent, that by perception of the rents and profits not only the intereſt, but the principal alſo, ſhould be paid; and when the ſtate of the title is recollected, that upon the wife's death the property would go to the children, a ſtrong ground of prudence appears for taking the mortgage in that way. If ſo, the defendant has a right to the benefit of that circumſtance; which would naturally have occured in the dealing of perſons, providing for repayment by the application of a partial intereſt; which proving ineffectual, the money itſelf would be in danger. Theſe circumſtances muſt not be forgot.

(*a*) It was ſaid at the Bar, that upon inquiry the fact turned out to be ſo.

Then *Taylor*, a truſtee, entirely without intereſt, and therefore, though a defendant, examined as a witneſs, is the only witneſs, upon whoſe teſtimony the decree is to be made. The bill being amended, and this being a caſe, in which the Court ought to be particularly ſure of the ground, on which it decides upon a fact equivocal, or a declaration, more or leſs according to the recollection of the preciſe terms by the witneſs, it is not unfair to obſerve, that probably before the amendment the plaintiff muſt have collected the account of it from *Taylor*; if he was the only perſon, from whom ſhe could have got the account; and the bill was then amended, in order to introduce the allegation as to *Stanſell*'s repreſentation to *Bicknell*. *Taylor* does not recollect half as much in his anſwer as in his evidence; and that is a very material circumſtance, when the defendant is to be charged upon this ground; that more credit is to be given to the defendant's denial than to the aſſertion of one witneſs. It ought to be with reaſonable certainty put in iſſue by the allegations of the bill. *Taylor*'s account is not neceſſarily inconſiſtent, I do not ſay it is neceſſarily conſiſtent, with *Bicknell*'s: but it muſt be neceſſarily inconſiſtent, and more credible than the denial by the anſwer, before the decree can be made. He ſays, the purpoſe, as repreſented by *Bicknell*, was to ſhew the deeds to ſome perſon, who would let him have credit in the way of his trade; and in the ſame converſation they were to be brought back in an hour. That negatives the very idea, that the eſtate was to be pledged. That mode of repreſenting the converſation, inſtead of oppoſing, confirms *Bicknell*'s anſwer. Upon his anſwer therefore and *Taylor*'s evidence there is not that ſort of contradiction, that entitles the plaintiff to a decree againſt *Bicknell* on the ground of fraud. The circumſtance of *Taylor*'s examination ſhews the danger; for *Bicknell* had no opportunity of anſwering the farther evidence of expreſs charge. It is very extraordinary to ſay, this Court will not act upon the evidence of one witneſs contradicting the anſwer, and yet it will act upon that evidence, in order to charge the defendant in a circumſtance, to which he has had no opportunity of ſtating himſelf. That therefore could only be a ground for enquiry.

But, even taking the whole of *Taylor*'s evidence, I ſtill entertain great doubt, whether upon ſuch a tranſaction a party ſhould be charged perſonally; for even upon that it amounts to no more than

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than that a truſtee delivers the deeds into the hands of a party, who has the ſettlement. I do not ſay, it is not negligence; but it is too dangerous upon ſuch looſe evidence to hold, that it is that groſs negligence, that amounts to evidence of fraud. The converſation, that the repayment was to be by the application of two years' rents, does not look like the ſuggeſtion of a mortgage; and it is remarkable, that there is a proviſion for repayment out of the rents. The queſtion therefore will be, whether *Taylor*'s evidence is to be taken, as conſtituting evidence riſing as high as fraud; ſo as to ſupport a perſonal decree againſt *Bicknell*; and to the extent of excluding *Bicknell* from an inquiry, and an opportunity of giving his own account; and upon the principles of this Court I think it cannot.

I conceive, it is now very well ſettled, that the doctrine of Mr. Juſtice *Buller*, that I have juſt ſtated, is founded upon error. It would be an idle waſte of time to go through all the caſes; which will be found in *Plumb* v. *Fluitt* (*a*), and admirably well ſtated by Mr. *Fonblanque* (*b*). The doctrine at laſt is, that the mere circumſtance of parting with the title deeds, unleſs there is fraud, concealment, or ſome ſuch purpoſe or ſome concurrence in ſuch purpoſe, or that groſs negligence, that amounts to evidence of a fraudulent intention, is not of itſelf a ſufficient ground to poſtpone the firſt mortgagee. I agree with Chief Juſtice *Eyre*, I ſhould have been glad to have found the rule eſtabliſhed in the Court the other way. At the ſame time allowance muſt be made for the caſes put by Mr. *Fonblanque* of joint-tenants and tenants in common; caſes of neceſſary exception: all cannot have the deeds. Therefore, if the rule could be preſſed to the extent, to which Mr. Juſtice *Buller* carried it, thoſe caſes muſt be excepted, in which from the nature of the title the deeds may be honeſtly out of the poſſeſſion. With that exception ſuch a rule would avoid a great deal of fraud in mortgage titles; upon which this obſervation ariſes; that no man can tell, when he is perfectly ſecure. But there is not ſuch a rule.

Then, as to concealment; as the caſe of perſons ſtanding by, as witneſſes to deeds: if it is to be taken as a fact, that the witneſs knows the contents of the inſtrument, to which he is a witneſs;

(*a*) 2 *Anſtr.* 432.

(*b*) 1 *Fonb. Treat. Eq.* 262, note (*n*).

the engroſſment of the mortgage by a perſon entitled under a prior entail; no recovery having been ſuffered: all theſe caſes, either of poſitive repreſentation contrary to the truth, or concealment of what ought to have been repreſented, are intelligible; but it is not to be denied, that, where there has been mere negligence, though it may have very miſchievous conſequences, the Court has not charged the party, unleſs it has been ſo groſs as to amount to evidence of fraud. The caſe of the *Thatched Houſe* Tavern was very ſtrong. The mortgagor, deſiring to have the deeds, repreſented to the mortgagee, that he was about to make additional buildings; which would improve his ſecurity. The purpoſe of delivering the deeds was innocent: but it gave the other the complete power of executing the fraudulent purpoſe. Having got the title deeds he makes a mortgage; and then contrived to get the leaſe back from the ſecond mortgagee and reſtored it to the firſt. But the negligence did not reſt upon that only. The mortgagor applied a ſecond time to the firſt mortgagee, and under another pretence got the deeds again; which enabled him a ſecond time to cheat third perſons; and he made a third mortgage. The circumſtance of his parting with them again was ſtrong. Then the queſtion aroſe upon theſe mortgages; whether the firſt ſhould not be poſtponed to the ſecond and third: but the Court thought, there muſt be ſome concurrence in a fraudulent purpoſe; and the purpoſe held out diſcloſed nothing of fraud. If negligence alone was ſufficient, it ought to have had the effect in that caſe: but the Court ſaid, the firſt mortgagee had done nothing unconſcientious; and did not conceive themſelves entitled to relieve the ſubſequent mortgagees. If he had not got back the leaſe again, perhaps by conſequence he would have been poſtponed; but not upon the ground, that he had parted with it, but upon *Head* v. *Egerton* (*a*); for it would have been impoſſible to have taken it from the ſecond mortgagee; and notwithſtanding any decree, that may be made, the caſe is open to theſe plaintiffs, if they can make any thing of it upon that.

If then the caſes go to this only, that there muſt be poſitive fraud or concealment, or negligence ſo groſs as to amount to fraud, is there in this caſe evidence, reſting upon that high degree of probability, upon which the Court, guided by its conſcience muſt act,

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(*a*) 3 *P. Will.* 279.

If the intention is fraudulent, though not pointing exactly to the object accompliſhed, yet the party is bound.

act, that this truſtee had a fraudulent purpoſe: if not, is there negligence ſo groſs as to amount to conſtructive fraud; as Chief Juſtice *Eyre* expreſſes it in *Plumb* v. *Fluitt*; ſuch evidence of fraud, that he ſhall not be heard in a court of juſtice to ſay, there was not fraud? I agree, if the intention is fraudulent in any reſpect, though not pointing exactly to the object accompliſhed, yet he will be bound. That was Lord *Thurlow*'s doctrine in *Beckett* v. *Cordley*; and was the doctrine in much older caſes; as, where a bond was given upon a marriage; and the marriage with that perſon went off, and took place with another: the party could not ſay, the bond was not intended as to the marriage, which took effect. The Court would ſay, it was a fraudulent act; and though not preciſely that intended by the parties, yet a uſe was made of it, to which the delivery of that bond naturally led; and therefore he ſhould be bound. If therefore in this caſe I could be perfectly ſatisfied, that the intention was, according to the allegations in this bill, taken altogether, that he might repreſent himſelf as entitled to credit as owner of the premiſes, and obtain credit in his trade by repreſenting himſelf as owner of the premiſes, and that *Bicknell* acceded to that purpoſe, ſo underſtood, I ſhould be ſtrongly diſpoſed to hold *Bicknell* liable to the extent, in which *Stanſell*'s holding himſelf out as owner had involved a third party. But I cannot ſay, it is clear, that at the time of the application to *Bicknell* *Stanſell* had this deſign. It is not clear, that it did not occur to him, after he had obtained poſſeſſion of the deeds; and it is far from being clear upon the evidence, that *Bicknell* knew, that ſuch was the intention; for the tranſaction was not unnatural. I cannot expect them to reaſon upon the niceties of title. When we conſider the title of the wife, as her ſeparate intereſt, it is an argument: but it would be very hard to preſs it as an evidence of fraud; and a fraud, of the nature of which ſuch a truſtee muſt be ſenſible; ſo that I muſt collect a fraudulent purpoſe. I heſitate alſo in giving *Taylor* credit for his evidence, carried in the depoſitions ſo much farther than the anſwer; and the bill containing no allegation to give *Bicknell* the benefit of his anſwer; with the converſation, that the money was to be repaid by two years' rents; and the circumſtance, that in the ſecurity the rents are really devoted to the principal as well as the intereſt. Then, if there is no expreſs declaration or concealment by the truſtee, it reſults to this; whether under all the circumſtances and the anſwer and evidence together the mere parting with the deeds for the purpoſe ſtated and on condition to return them in a few hours to a man, having the ſettlement in his poſſeſſion, is a circumſtance of ſo groſs negligence, and becauſe it may poſſibly lead to miſchief, that it is concluſive evidence of fraud. I am very ſorry, the Court acts upon a rule ſo looſe and dangerous to property: but if ſuch is the rule, I cannot under all the circumſtances upon this ſtate of the record charge *Bicknell* with this ſum of 300*l.*

The only remaining queſtion is, whether there ought to be farther inquiry upon the ſubject. That may be by diſmiſſing this bill without prejudice to an action; and probably in that way the plaintiffs may meet with more favourable equity than I ſhould give them by directing an iſſue; for I ſhould not direct that without giving *Bicknell* the ſame benefit, that might reſult from the honeſty or diſhoneſty of his conſcience, as he would have in equity. The iſſue ought to be upon this queſtion; whether the deeds were fraudulently delivered to enable *Stanſell* to obtain money of other perſons; for that general direction would be conſiſtent with the principle I adopt; that, if the intention was fraudulent, it is not material, whether it was to obtain money of other perſons in the way of his trade by repreſenting himſelf as owner of the premiſes, or by a mortgage. I am not ſo perfectly ſatisfied, that *Bicknell* meant well, as to refuſe that iſſue, if the plaintiffs chooſe to take it: but unleſs I am ſatisfied by a Jury, that there was ſuch fraudulent intent, I ſhall diſmiſs the bill without coſts; for there is negligence enough for me to ſay, he ſhall not have his coſts.

The caſe of *Arnot* v. *Biſcoe*, which was relied upon, is very diſtinguiſhable. The defendant declared the title to be in every reſpect good: a fact very materially diſcriminating that caſe from this; for Lord *Hardwicke* very properly puts the attorney in the ſituation of the vendor himſelf; and then the plaintiff's money was advanced upon the expreſs declaration of that attorney, that the title was clear. Lord *Hardwicke* lays down the principle of equity, that, wherever the buyer is drawn in by miſrepreſentation or concealment of a material fact or circumſtance, ſo as to be injured thereby, and that done with intention and fraud, he is entitled to ſatisfaction here. In that paſſage and others Lord *Hard-*

wicke lays ſo much ſtreſs upon the title to relief here, that I think it very queſtionable, whether he foreſaw the relief, that has been given upon the principle theſe caſes furniſh ſo liberally at law; and there ſeems ſomething like a declaration by him, that if a firſt mortgagee does not take the title deeds, he ſhall be poſtponed. That appears to have been the old notion of the Court.

The decree was made againſt *Stanſell* for the ſale of his intereſt in the eſtate, and payment of the deficiency: as againſt *Bicknell* the bill to be diſmiſſed without coſts; unleſs the plaintiff would take the iſſue; in which caſe *Bicknell* was to be examined; and if they choſe to have the bill diſmiſſed, it was to be without prejudice to an action.

July 6.

TOWNLEY *v.* BEDWELL.

Truſt of real and perſonal eſtate by will, for the purpoſe of eſtabliſhing a perpetual Botanical Garden, declared void, upon the expreſſion of the teſtator, that he truſted it would be a public benefit.

BENJAMIN ROBERTSON by his will, dated the 1ſt of *September* 1800, gave to *Mary Smalt* an annuity of 30 *l.* and to her daughter *Charlotte Smalt* 200 *l.* a year; to his ſiſter *Eſther Moore* and to a ſiſter-in-law 20 *l.* a year each. He gave to each of the children of his deceaſed ſiſter *Mary Bedwell* a legacy of 100 *l.*; not to be veſted before the age of twenty-one. He deviſed to *Charlotte Smalt* the houſe he dwelt in at *Stockwell* with the kitchen garden, and appurtenances, for her life; with the houſehold furniture, beds, linen, *&c,* and other articles, belonging to the houſe; to be uſed and enjoyed by her for life, or as long as ſhe lives in the houſe; and after ſome other legacies and annuities he proceeded in the following manner:

"And whereas I have after many years' labour, and at a very "great expence, raiſed a freehold botanic garden at *Stockwell* "aforeſaid, with ſeveral buildings for the purpoſe of containing "a very large collection of plants and other things; and not "having any family or very near relations (other than thoſe be-"fore mentioned) I am deſirous of deviſing and bequeathing all

“ my freehold eſtates and the reverſion of my ſaid houſe and
“ kitchen garden at *Stockwell* with the appurtenances thereunto
“ belonging, herein before deviſed to *Charlotte Smalt* for life, or
“ ſo long as ſhe ſhall think fit to reſide in the ſaid premiſes; and
“ all the reſidue of my ſtock, funds, perſonal eſtate, and other property,
“ unto truſtees, to maintain and improve the ſaid collection
“ of plants and other things either in my new botanic garden
“ at *Stockwell*, or in ſuch other garden as they ſhall think
“ proper, as far as the property I mean to deviſe to the ſaid truſtees
“ will admit of, for ever, and under however the inſpection
“ of my executors herein named during their lives and the life of
“ the ſurvivor of them; and I alſo wiſh (if occaſion require and
“ the property deviſed will admit of it) that my ſaid botanic garden
“ may be enlarged (by taking in a part of my ground adjoining)
“ and the collection of plants increaſed, in ſuch a manner
“ as my truſtees ſhall think proper, and find convenient; as I
“ truſt it will be a public benefit; and do wiſh and deſire, that
“ my preſent botanic garden, with any enlargement thereof, or
“ any other botanic garden to be purchaſed or formed and eſtabliſhed
“ under and by virtue of this my will by my truſtees
“ (whereſoever ſituated) ſhould be called “ *Stockwell* Botanic
“ Garden, founded by *Benjamin Robertſon*, Eſquire;” and an
“ inſcription accordingly placed and preſerved over the principal
“ gate or door of ſuch garden for the time being; now for the
“ purpoſe of carrying this my intention into execution I do give,
“ deviſe, and bequeath, my ſaid botanic garden at *Stockwell*, and
“ all other my lands and grounds near or adjoining thereto,
“ and the reverſion of my houſe and kitchen garden at *Stockwell*,
“ with the appurtenances after the death of *Charlotte Smalt*, or
“ when and ſo ſoon as ſhe ſhall ceaſe to reſide in the ſaid premiſes
“ and all other my real eſtates whatſover and whereſoever
“ ſituated, and all the reſt, reſidue, and remainder, of my
“ money in the public funds, and of all other my perſonal
“ eſtate and effects of whatſoever nature or kind the ſame is or
“ may be at the time of my deceaſe, and whereſover the ſame is
“ or may be, and every part and parcel thereof, with their and
“ every of their rights, members, and appurtenants (the botanic
“ books before mentioned always to accompany and belong to
“ the botanic garden for the time being) unto *Edward William*
“ *Townley*, one of my executors, *Robert Barclay* of *Clapham*,

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“ Eſquire, *Adrian Hardy Haworth* of *Chelſea*, Eſquire, *William* “ *Acton* of *Kew*, Eſquire, *Alexander M'Leay*, Secretary to the “ *Linnean* Society, Mr. *Thomas Goode*, one of my executors, and “ *Alexander Malcolm* of *Stockwell*, nurſeryman, and their heirs, “ executors, adminiſtrators, and aſſigns, according to the reſpective natures of the ſeveral and reſpective eſtates by me hereby “ given, deviſed, and bequeathed, to them for ever; (the real “ eſtates not to be unalienable but ſaleable and aſſignable at the “ will and with the conſent of all my truſtees for the time being), “ upon truſt, that they do and ſhall with the produce and profits “ thereof keep, preſerve, and for ever hereafter maintain and “ ſupport, my botanic garden at *Stockwell* aforeſaid, or ſome other “ garden to be purchaſed, formed, and eſtabliſhed, under and “ by virtue of this my will (no ſuch garden to be unalienable but “ ſaleable and aſſignable in manner and form aforeſaid and as “ herein expreſſed) at the diſcretion of all and not leſs than all “ of my truſtees for the time being; and it is my will, and I “ recommend to my truſtees for the time being to conſult with “ and call in my executors herein named, during their lives in “ and about the management and keeping up the ſaid garden, or “ any other garden, all (but not leſs or fewer in number than “ all) my truſtees for the time being may think fit to purchaſe, “ form, and eſtabliſh, under and by virtue of this my will, “ and all things appertaining to ſuch garden for the time being. “ But my will and deſire is, that, if any new garden ſhould be “ purchaſed, formed, and eſtabliſhed, the ſame ſhould be freehold; “ and be ſituated (if poſſible) at *Stockwell*, or as near thereto as “ can be; and I direct, that ſuch garden for the time being ſhall “ for ever hereafter be called and known by the name of ‘*Stockwell* Botanic Garden founded by *Benjamin Robertſon* Eſquire;’ “ and that ſuch inſcription be put up, and preſerved, as aforeſaid; “ and I will and direct, that my truſtees for the time being ſhall “ each be anſwerable for his own acts only and not one for another; and that they ſhall not be liable (otherwiſe than as hereafter mentioned) to account for any ſurplus or reſidue of the “ rents, intereſt, income, or produce, of my eſtate and effects, “ which may at any time accrue or happen, after anſwering the “ purpoſes aforeſaid, to any perſon whomſoever; it being my expreſs wiſh and deſire, that ſuch garden for the time being may “ be from time to time kept up and improved and extended in

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" as ample a manner as the income of my eſtate will admit of; " and my will and mind is, that it ſhall and may at all times " hereafter be lawful to and for my truſtees for the time being to " ſell and diſpoſe of my preſent botanic garden, with the build- " ings and appurtenances thereto belonging, whenever all and " not fewer than all of them ſhall think fit, for the beſt price, " that can be procured and got for the ſame; and with the " money to ariſe from the ſale thereof to purchaſe other freehold " ground and buildings, or erect buildings, and form and eſtabliſh " another botanic garden, premiſes, and appurtenances, of equal " value at leaſt with the premiſes ſold: the ſame to be ſituated in " the county of *Surry*, and as near to *Stockwell* as may be; and " it ſhall in like manner be lawful for all but not leſs or fewer " in number than all my truſtees for the time being to ſell the " botanic garden and buildings with the appurtenances for the " time being, and make the like purchaſe, and form and eſtabliſh " ſuch other freehold botanic garden with buildings and appur- " tenances of equal value in manner and form aforeſaid, in or as " near to *Stockwell* as may be: And it is my will, that my truſtees " for the time being (if they ſhould be all deſirous of ſelling my " preſent botanic garden) do before the ſale remove as many of " the plants and other things growing and being therein as they " conveniently can; and replant and place the ſame in the new " purchaſed ground, garden, buildings and premiſes, and keep " poſſeſſion of my preſent garden until removal of ſuch plants " and other things; and ſo *toties quoties*, whenever they ſhall ſell " one garden, and purchaſe, form and eſtabliſh, another; and I " will and deſire, that whenever any ſale is in contemplation the " truſtees for the time being, if leſs than ſeven in number, do " before entering into any contract for ſale fill up the number of " truſtees to the number of ſeven in manner herein after men- " tioned."

The teſtator then gave directions for keeping up the number of truſtees by the appointment of the majority upon death or declining to act. The teſtator died upon the 7th of *December* 1800. The bill was filed by the executors againſt the next of kin according to the Statute; *viz. Eſther Moore*, the only ſurviving ſiſter of the teſtator, the ſon and three daughters of his ſiſter *Mary Bedwell*, who died in his life, and againſt the other truſtees and the

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Attorney General, for the purpoſe of having the will eſtabliſhed, and the truſts carried into execution.

The defendants *Eſther Moore* and *John Bedwell*, the infant nephew of the teſtator, claimed the real eſtate, either upon the ground, that the deviſe was void, or, if not, as a reſulting truſt; no uſe being declared for any one. They alſo claimed the perſonal eſtate directed to be laid out in land. The real eſtate produced a rent of 1,200*l.* a year; and the perſonal property conſiſted of above 23,000*l.*

Lord CHANCELLOR aſked, for whoſe benefit all this was to be.

The *Solicitor General* and Mr. *Romilly* for the truſtees compared it to the caſe of a gift of a piece of land for the purpoſe of erecting monuments of the naval victories of this country. The caſe upon Mr. *Bradley*'s will was mentioned.

Lord CHANCELLOR ſaid, in that caſe the heir might pull them down; and in this he might deſtroy the garden: but his Lordſhip thought, that upon the expreſſion of the teſtator, that he truſted, it would be a public benefit, he might venture to declare it void.

Mr. *Richards* and Mr. *Alexander* for ſome of the next of kin oppoſed the claim of the heirs at law to the perſonal eſtate directed to be laid out in land; inſiſting, that the object being either void, or not declared, the heir was not entitled to have the property converted (*a*); to which opinion the Lord Chancellor inclined.

The decree declared the diſpoſition, as far as it relates to the botanical garden, void; and directed inquiries, who are the heirs at law and next of kin of the teſtator; and whether it was for the benefit of the perſons entitled to the real and perſonal eſtate that the plants ſhould be diſpoſed of.

(*a*) *Wheldale* v. *Partridge*, *ante*, vol. 5. 388. and the references in the note (*b*) 394.

SITTINGS AFTER

Trinity Term

CONTINUED.

41 GEO. 3. 1801.

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HARMOOD *v.* OGLANDER [a].

Rolls.
Feb. 24, 25. 1800.
March 21. 1801.

Deviſe of fee-farm rents revoked in equity as well as at law by a ſubſequent conveyance to a truſtee, operating an alteration of the eſtate beyond the mere purpoſe of ſecuring a mortgage: but on account of the laches of the plaintiffs, the heirs at law, the Maſter of the Rolls would not aſſiſt them further than by retaining the bill; with liberty to bring ſuch action or ſuit as they may be adviſed; to give an opportunity of taking the opinion of a Court of Law upon the queſtion, whether there is a revocation at Law; or, whether a Court of Law will preſume republication from the long poſſeſſion, leaving open the queſtion, whether the plaintiffs are entitled to any account, or how far back.

By a ſettlement executed in 1743, previous to the marriage of *Abraham Weekes*, certain fee-farm rents, of which he was ſeiſed in tail, were agreed to be ſettled, to the uſe of himſelf for life; remainder to truſtees to preſerve contingent remainders; remainder to his intended wife for life; remainder for a term of years for raiſing portions for younger children; remainder to his firſt and other ſons in tail male; remainder to truſtees for another term, for raiſing portions for daughters in failure of iſſue male; remainder to the heirs and aſſigns of *Abraham Weekes*.

In 1749 a recovery was ſuffered; and the uſes declared to *Abraham Weekes* in fee.

Abraham Weekes by his will, dated the 24th of *May* 1750, directed, that his debts and funeral expences ſhould be firſt paid;

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[a] This caſe was determined by Lord *Alvanley*, when Maſter of the Rolls: but the report has been inevitably poſtponed.

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and charged all his eſtates in poſſeſſion, reverſion, remainder or expectancy, with the payment thereof; and ſubject thereto he deviſed all his real eſtates to his wife for life; and after her death he deviſed a part of his eſtate, called *Canefield*, to his ſiſter *Elizabeth Weekes* for life; and after her death he deviſed ſuch eſtate, and deviſed the reſt of his real eſtate immediately after the death of his wife, to his ſiſter *Mellicent Crop* and to her heirs for ever; and he directed, that, as ſoon after his death as conveniently might be, part of his real eſtate, except the ſaid part, called *Canefield*, ſhould be ſold for payment of all his debts; and that his wife, and his ſiſter *Crop* and her huſband, and all other proper parties, ſhould join in the ſale.

In *November* 1750 the teſtator borrowed the ſum of 5,500*l.* of *Mellicent Neate* upon mortgage of part of his real eſtate by indentures, executed on the 16th of *November* for 1000 years; and by indentures of leaſe and releaſe, dated the 15th and 16th of *November* 1750, for the farther and better ſecuring the repayment of the ſaid ſum of 5,500*l.* with intereſt, and for barring all eſtates tail and all reverſions and remainders thereupon expectant in ſaid fee-farm rents, and for limiting and aſſuring the ſame for ſuch uſes, upon ſuch truſts, and to and for ſuch intents and purpoſes, as herein after expreſſed concerning the ſame, *Abraham Weekes* and his wife conveyed the fee-farm rents to *Charles Lawrence*, his heirs and aſſigns; to hold to him, his heirs and aſſigns, to the intent, that a Recovery might be ſuffered; and it was declared, that ſuch recovery ſhould enure to *Mellicent Neate* for the term of 1000 years, ſubject to the proviſo of redemption, *&c.*; and from and after the determination of the term, to the uſe of *Abraham Weekes* and his aſſigns for life, without impeachment of waſte; remainder to *Frances*, his wife, and her aſſigns for life; remainder to *Abraham Weekes*, his heirs and aſſigns.

Some proceedings were had towards ſuffering a Recovery: but it was never completed. In *May* 1755 the teſtator died, without iſſue; leaving three ſiſters, his co-heireſſes at law: *Elizabeth Weekes*, *Mellicent Crop*, and *Mary Harmood*. His widow married *James O'Donnell*; and a bill was filed by them; under which the will was eſtabliſhed; part of the real eſtates ſold; and the debts, including the mortgage to *Mellicent Neate*, paid. In *June* 1764 *Mellicent Crop* died; and Mrs. *O'Donnell* in *December* following.

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This bill was filed in *April* 1796 by the heirs at law of *Mary Harmood*; who was alſo dead; praying an account from the heirs of *Mellicent Crop* and the repreſentatives of *Elizabeth Weekes*, and a conveyance of one third from the heirs of *Lawrence*, the truſtee, on the ground, that the will was revoked.

The defendants by their anſwers inſiſted, that the will was not revoked; relying alſo on the laches of the plaintiffs. Letters from the principal defendant, dated in 1786 and 1787, were produced; ſuggeſting, that he had heard, the plaintiffs had ſome pretenſion; deſiring them to put it in a courſe of diſcuſſion; and propoſing to leave a proportion of the rents, until it ſhould be ſettled; and it was admitted by the anſwers, that a claim was at different times ſet up; but never aſſerted by any ſuit.

The queſtions upon the pleadings were 1ſt, whether the will was revoked: 2dly, as to the effect of the length of time. A 3d queſtion was ſuggeſted by the Court; whether, ſuppoſing the will revoked, the fee-farm rents deſcending to the heir at law would not be primarily applicable to the debts, as deſcended eſtates, before eſtates deviſed.

Mr. Cox and Mr. Fonblanque for the plaintiffs—The principal queſtion is, whether the ſettlement ſubſequent to the will diſpoſing of the fee-farm rents, though not perfected, had not the effect of revoking the will. Though no Recovery was ſuffered at the execution of the ſettlement of 1743, it is rightly inſiſted, that the recovery ſuffered in 1749, the uſes of which were declared to *Abraham Weekes* in fee, enured to the uſes of the ſettlement.

The queſtion of revocation has been diſcuſſed ſo much at length within the laſt few years (*a*), that it is unneceſſery to go through all the caſes. The whole of the law upon this ſubject originates in the principle laid down by Lord *Hardwicke* in *Sparrow* v.

(*a*) See *Brydges* v. *The Ducheſs of Chandos*, *ante*, vol. 2. 417. vol. 3. 761. *Williams* v. *Owens*, *ante*, vol. 2. 595. *Cave* v. *Holford*; *Goodtitle* v. *Otway*, *ante*, vol. 2. 604 (note), vol. 3. 650. vol. 4. 850. 1 *Boſ.* and *Pul.* 576. 7 *Term Rep. B. R.* 399. *Earl Temple* v. *The Ducheſs of Chandos*, *ante*, vol. 3. 685. *Baxter* v. *Dyer*, *ante*, vol. 5. 656. *Knollys* v. *Alcock*, *ante*, vol. 5. 648, a revocation by an agreement for partition.

As to revocation by marriage and the birth of a child, ſee *Gibbons* v. *Caunt*, *ante*, vol. 4. 840. and *Kenebel* v. *Scrafton*, ſtated *ante*, vol. 5. 663.

Hardcaſtle (*a*), and afterwards, more at length, in that very elaborate judgment of the Lord Chancellor in *Brydges* v. *The Ducheſs of Chandos*; that the deviſor muſt not only have the eſtate at the conception of the will, but it muſt continue in him: otherwiſe there is a revocation. That is the word conſtantly uſed: but "ademption" is the more proper expreſſion: the deviſor not having the eſtate in him any longer for the will to operate upon. This rule is univerſal. The caſes ſpoken of as exceptions are improperly called ſo. They fall in with the rule, and the principle, upon which it is eſtabliſhed. The rule applies equally to equitable and real eſtates. In *Brydges* v. *The Ducheſs of Chandos* the Lord Chancellor takes great pains to prevent being miſunderſtood; and his opinion is clear; that there is no caſe in equity of revocation as to equitable eſtates, that would not upon legal principles be a revocation; and your Honour in the ſubſequent caſe (*b*) takes notice of that. The intention is not material. It proceeds upon the rule of law. Nothing ſhews that more clearly than the caſe of the Recovery ſuffered on purpoſe to ſubſtantiate the will: but the effect is to take back a new eſtate. The act of a deviſor ſeiſed in fee conveying and taking back an eſtate in fee was long ago held a revocation. It is not material, that he takes back the ſame quantity of intereſt. It muſt be the ſame eſtate he had in him at the execution of the will. Nor, as the Lord Chancellor obſerves in the ſame caſe, is the particular purpoſe of any conſequence; and he puts the inſtance of Lord *Lincoln*'s caſe (*c*), than which nothing more particular could be.

The caſes of mortgages and charges for payment of debts do not impeach the rule; and can hardly be conſidered as exceptions. A mortgage here is a mere charge; and is conſidered as perſonal eſtate of the mortgagee. The eſtate therefore is that of the mortgagor. This doctrine applies, notwithſtanding the eſtate paſſes at law: equity conſidering a mortgage in that point of view, the eſtate is ſtill in the mortgagor, ſubject only to the mortgage; never having been parted with; but continuing in him unaltered, except only in reſpect of that mortgage.

(*a*) 3 *Atk.* 798. *Amb.* 224.

(*b*) *Williams* v. *Owns*, *ante*, vol. 2. 595.

(*c*) 1 *Eq. Ca. Ab.* 411. *Show. P. C.* 154.

Another claſs of caſes is, where the deviſor having only an equitable eſtate in him at the date of the will deviſes that; and then takes the legal eſtate; which has been determined to be no revocation (*a*). That is not inconſiſtent with the general rule. The equitable eſtate deviſed is not deſtroyed; though for ſome purpoſes it may be conſidered as a merger (*b*). The deviſor has it in him; and therefore it is within the rule, which may be ſtated generally; that the act always operates a revocation, where the deviſor has not the ſame eſtate in him, that he had at the time he made his will. The deed in this caſe was made with a view to a Recovery; which in fact was never ſuffered: but it is decided, that a deed for the purpoſe of making a tenant to the *Præcipe* is a revocation. As far as the intention can be material, the deviſor had more in view by this deed than merely making a ſecurity. That was to be done only by the term of 1000 years: but beyond that theſe fee-farm rents are limited and aſſured to the deviſor for life; then to his wife for life; then to him, his heirs and aſſigns. If there had been no mortgage, and the deviſor had made ſuch a conveyance, can it be doubted, that it would be a revocation? How could it be otherwiſe, if that would be the effect, as it certainly would, of a conveyance by a deviſor, ſeiſed in fee, taking back an eſtate in fee, or a fine levied by tenant in tail, having the reverſion in fee, the uſes of which are declared to him in fee? This caſe has no difference but this term to make a ſecurity. If he had confined himſelf to that purpoſe, it would be very different: but he has gone much farther. The object was, ſubject to that term, to take back a new eſtate; which muſt have the effect of a revocation. It is not the eſtate, that was in him, when he made his will; and that is all, that is neceſſary for this purpoſe. It is only neceſſary to ſhew the inconſiſtency of the two inſtruments. It is clearly not a queſtion of intention; but, in the emphatical language of the Civil Law, *preſumptio*, or rather, *concluſio, juris et de jure*; for there can be no averment againſt it. The queſtion is only, whether that ſeiſin, which the teſtator had, was or was not broken in upon by the ſubſequent indentures. If the purpoſe had ſtopped at providing for the debt, that even at law would have been no revocation. If he had made a mortgage in fee, this Court would have conſidered the ſeiſin to continue, certainly

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(*a*) *Watts* v. *Fullarton*; cited *Dougl.* 691. *ante*, vol. 2. 602.

(*b*) *Philips* v. *Brydges*, *ante*, vol. 3. 120.

not upon any rule of its own, but following legal principles; and the Court would have found a ſtrong authority for that in the Statute of Wills (*a*); the language of which is not "*ſeiſed*," but "*having*." Obſerve the manner, in which the Lord Chancellor in *Brydges* v. *The Ducheſs of Chandos* felt himſelf obliged to treat the ſubſequent ſettlement, made in purſuance of the articles, at leaſt in part, with every diſpoſition to ſupport the will. In *Williams* v. *Owens* Your Honour founded your judgment, that the will was not revoked, very much upon the authority of that caſe. If the conveyance had been merely a fulfilment of the articles, cloathing the equitable intereſt with the legal eſtate, the ſeiſin neceſſary for the purpoſe of the will could not have been ſaid to be diſturbed. The Lord Chancellor found himſelf under the neceſſity of declaring the rule.

The caſe of partition certainly is the moſt doubtful, and the moſt difficult, to be reconciled with the ſeiſin; but the Lord Chancellor in *Brydges* v. *The Ducheſs of Chandos* adopted the rule eſtabliſhed in *Tickner* v. *Tickner*, and followed by Lord *Hardwicke*; that, where the object of the deed went farther than a mere partition, and beyond dividing it was even the mere act of conveying the eſtate to ſuch uſes as the party ſhould appoint, it was a revocation (*b*); and your honour's reaſoning in *Williams* v. *Owens* is the ſame. In *Cave* v. *Holford* (*c*) the principles are fully recogniſed; and the difference of opinion aroſe only upon the application of the principles and authorities to that caſe. Lord Chief Juſtice *Eyre* upon the caſe of partition felt himſelf preſſed with the ſame difficulty, that had embarraſſed Lord *Hardwicke* and Lord *Loughborough*. The concluſion is, that, wherever there is an *ultra* purpoſe, that makes a revocation; though perhaps directly againſt the avowed intention.

But upon this occaſion all this is unneceſſary; for it is impoſſible, that theſe two inſtruments can be reconciled. It will be ſaid, the reverſion is reſerved; and the will can operate upon

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(*a*) 32 *Hen.* 8. *c.* 1. 34 *Hen.* 8. *c.* 5.

(*b*) See alſo *Kenyon* v. *Sutton*, cited *ante*, vol. 2. 601. and *Nott* v. *Shirley*, ſtated *ante*, vol. 2. 604. in the note to *Williams* v. *Owens*.

(*c*) *Ante*, vol. 2. 604. *n.* vol. 3. 650. vol. 4. 850. 1 *Boſ. & Pul.* 576. 7 *Term Rep. B. R.* 399.

that: but all the authorities are againſt that. Among Mr. *Melmoth's* collection of manuſcripts is a caſe of *James* v. *Philips*, the 20th of *April* 1733. *A* made his will; and deviſed to the plaintiff. Afterwards the deviſor marries; and ſettles this intereſt, which he had deviſed, to the uſe of himſelf for life, then to his wife for life; remainder to the iſſue of the marriage; remainder to his own right heirs; and dies without iſſue. The plaintiff inſiſted, the will was not revoked; and might operate upon the reverſion in fee: but the Maſter of the Rolls would not ſuffer it to be ſpoken to; and ſaid, the Earl of *Lincoln's* caſe was much ſtronger.

No caſe is more favourable than that ſpecial purpoſe to provide for the iſſue of the marriage.

As to the objection from the length of time, that alſo has been often before Your Honour; and the reſult of the authorities is, that length of time can operate only in three ways: either by analogy to ſome legal bar, eſtabliſhed by poſitive law: or, 2dly, where it affords a preſumption, that ſomething has been done; which, if done, would *per ſe* be a bar to the demand; or, 3dly, where the claim is of ſuch a nature, that after great length of time ſuch inconvenience would ariſe, that the Court will not enforce it (*a*). The principal queſtion in *Smith* v. *Clay* (*b*) belongs to the firſt of theſe heads; though certainly Lord *Camden* went rather beſide the queſtion upon the point of laches. In *Pickering* v. *Lord Stamford* (*c*) your honour after great conſideration laid down, that length of time *per ſe* is no bar to a claim in this Court. The reſult of that caſe, *Hercy* v. *Dinwoody* (*d*), and the others of that claſs, is, that it can have effect only in the above three caſes. The legiſlative proviſions and the preſumptions of Courts of Juſtice proceed upon the ſame principle, an anxiety to quiet rights and preſerve evidence. In the former the effect is a bar, but not in the latter. The rule "*Stabit preſumptio, donec* "*probetur in contrarium*," is a wiſe rule, and ought not to be ſtrained too far. The plaintiffs are therefore entitled to the account. There is no analogy to any legal bar. If we are to

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(*a*) *Pearſon* v. *Belchier*, *ante*, vol. 4. 627. *Fletcher* v. *Tollet*, *ante*, vol. 5. 3.

(*b*) *Amb.* 645. 3 *Bro. C. C.* 639. in a note to *Lord Deloraine* v. *Browne*.

(*c*) *Ante*, vol. 2. 272. 581. vol. 3. 332. 492.

(*d*) *Ante*, vol. 2. 87.

recur to legal proceedings, we muſt recur to the remedy by Aſſiſe; in which the rents and profits will be the meaſure of the damages under the ſtatute of *Gloceſter* (*a*). The letters ſhew, this claim was made many years ago; and continued down to 1787. They muſt have been aware, that it was a ſerious claim. Several eminent opinions were taken. There is no ſuch inconvenience therefore as in *Hercy* v. *Dinwoody*, and the other caſes.

With reſpect to the difficulty thrown out by the Court, a mere charge upon a particular eſtate will not exempt the deſcended eſtate: but it is as clearly eſtabliſhed by *Donne* v. *Lewis* (*b*), that, where a real fund is created expreſsly for the purpoſe of diſcharging the debts, and the other part of the eſtate is permitted to deſcend; the fund created for that purpoſe muſt be primarily applied. That caſe underwent great conſideration; as it was thought to break in upon *Galton* v. *Hancock* (*c*); and Lord *Thurlow* did not pronounce that decree lightly. It was made upon the inconſiſtency between *Powis* v. *Corbet* (*d*), and *Galton* v. *Hancock*. Here this part is not made a fund merely auxiliary to the perſonal eſtate: not that it would extend to exempt the perſonal eſtate (*e*): but it would be the next fund in the order after that.

Mr. Lloyd, Mr. Richards, Mr. Thomſon, and Mr. E. Morris, for the defendants—This is not a favourable caſe for the plaintiffs. If they ſucceed, they get an eſtate by mere accident; guilty alſo of uncommon laches. Upon the laſt point there can be no deciſion without an inquiry: but it ſhews the extreme difficulty ariſing from bringing forward theſe ſtale demands. This deviſor thought, no part of his eſtate would deſcend to his heir.

The queſtion now before the Court is, what was the tranſaction between theſe parties in 1750: whether any thing more in ſubſtance than to make a ſecurity for a ſum of money to Mrs. *Neate*; for it muſt be admitted, that if theſe inſtruments do ſubſtantially go beyond that, and extend to vary their intereſts, it is

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(*a*) 6 *Edw.* 1. *c.* 1. (*b*) 2 *Bro. C. C.* 257. (*c*) 2 *Atk.* 424.

(*d*) 3 *Atk.* 556. ſtated from the Regiſter's Book, *ante*, vol. 3. 116. in a note to *Manning* v. *Spooner*.

(*e*) See *Hartley* v. *Harle*, *ante*, 540. and the references.

impoſſible upon the late caſes to diſpute what is now become law certainly. The deviſor certainly muſt have the ſame quantity of dominion and the ſame mode of diſpoſition. That muſt be admitted upon *Tickner* v. *Tickner*, and *Kenyon* v. *Sutton*; the latter decided by Your Honour with great reluctance on account merely of the introduction of the power of appointment. If it can be ſhewn, that no eſtate was diſplaced, but the object was merely to let in the incumbrance, it is within the exception. We are to look to the intention. Admitting, many of the caſes have nothing to do with the intention, many depend upon the intention. Inſtances of the latter ſpecies are the caſe of the bargain and ſale without enrolment, the grant of a reverſion without attornment, *&c.* In all thoſe caſes, though the act is void, there is a revocation upon the intention. After all, theſe reaſons are perhaps more nice than intelligible, and more technical than ſenſible: but ſuch is the rule. Here there is no dominion; and no exerciſe of dominion, otherwiſe than the deviſor had it before. This is preciſely within the principle of the caſes of revocation *pro tanto*. No intention appears, and the inſtruments have no operation beyond letting in that mortgage; which over-rides all the limitations. Suppoſe the deed of 1750, inſtead of thoſe three limitations to the deviſor for life, then to his wife, with remainder to him, his heirs and aſſigns, had copied the uſes of the deed of 1743 exactly: that would clearly not have been a revocation; being only a reſervation of the equity of redemption in the very ſame manner, in which it would have reſulted, if there had been no declaration of uſes. So, if it had merely expreſſed the uſe to him and her for their lives, and ſaid nothing as to the reverſion, that would not have been a revocation; for the equity of redemption would have reſulted exactly in the ſame manner. It is the ſame, whether it reſults, or is reſerved; and the reaſon is, it does not carry the eſtate farther than it before extended. Why then ſhould the omiſſion of the eſtate to the firſt and other ſons and the term for portions make it a revocation? There is no inſtance of an omiſſion producing that effect. All the caſes are, where the deed has gone farther; and it muſt be admitted, that, if the deed went any farther, or if the deviſor's intereſt was different in any reſpect from what it was before, it would be a revocation. The object of this deed being confined to making a ſecurity diſtinguiſhes this caſe from Lord *Lincoln*'s caſe and all the reſt. There was no eſtate tail, to make a Recovery neceſſary. They did not copy the limitations of the former deed, or introduce a proviſion for children, becauſe it was probable, there would not be any children. The deviſor was ſuppoſed to be tenant in tail; and that occaſioned the Recovery. Theſe deeds are founded wholly in miſtake: but the ſingle object, to ſecure this debt, is clear. There is no deed, declaring the uſes of a Recovery, that does not contain the general words, "for limiting and aſſuring," &c.; which are relied upon. All beyond the mortgage operates nothing. Though the three excepted caſes are commonly ſaid to be mortgages, conveyances for payment of debts, and partition, yet there are other caſes: as, if the deed had been obtained by fraud; or executed under a miſtake, a miſapprehenſion of the deviſor's rights, upon a conſideration, that did not exiſt, under a miſrepreſentation, appearing upon the face of the deed. In thoſe caſes the Court would relieve againſt the deed; and upon the ſame principle would not hold it a revocation. Another conſideration is, whether, as no Recovery ever was ſuffered, any of theſe uſes ever ſprang. It is doubtful even, whether the legal eſtate is in *Lawrence*, the truſtee. There is however ſome difficulty in maintaining that: but clearly none of the uſes aroſe; and he took as a truſtee for the deviſor. Then he had only the eſtate under the ſettlement, accompanied with the reverſion in fee. No uſes aroſe therefore, that could produce any effect. In *Luther* v. *Kidby* (*a*), the partition being effected by deed and fine, the eſtate could not continue to be in the teſtator to the time of his death. The form of the conveyance in that caſe did produce an alteration in the ſeiſin; and yet the ſuſpenſion of the ſeiſin did not produce a revocation. The material diſtinction between that caſe and *Tickner* v. *Tickner* (*b*) is the introduction of the power of appointment in the latter. That will muſt have been revoked upon a ſolid ground, not a technical form. The deviſe was to the wife and her heirs: in the deed the limitation was to the huſband in fee: therefore there was a manifeſt inconſiſtency between the will and the deed; and a revocation upon other grounds than that ſet up in *Luther* v. *Kidby*. The form muſt be conſidered immaterial. In conſtruction of law

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(*a*) 3 *P. Will.* 170. *n.*

(*b*) Stated in *Parſons* v. *Freeman*, 3 *Atk.* 741. *Amb.* 116. 1 *Wilſ.* 308.

there can be no difference between a partition by deed and fine and a partition by writ. So in this caſe there is nothing but the particular form of the conveyance; and no ſubſtantial alteration. The deviſor after the execution of the deed was ſeiſed as to the ſubſtantial intereſt of preciſely the ſame eſtate. The remainder to the wife is no new limitation; but exiſted antecedently. Whether it was introduced into the deed, or not, was immaterial. As far as any intereſt was conferred upon her, ſhe derived that intereſt, not under this deed, but under the marriage ſettlement. As to the effect of imperfect, inoperative, conveyances for this purpoſe, all the judges, from the old caſe in *Roll* (*a*) to *Cave* v. *Holford*, ſtate, that the reaſon is, that no other intention could be preſumed, under which the party could have made that conveyance. Then it becomes a queſtion of intention. The caſe has been put of a Recovery ſuffered by tenant in tail with the reverſion in fee in him for the purpoſe of authenticating his will. That muſt proceed upon this ground; that the effect is a moſt important alteration in the eſtate. The eſtates of the deviſor previous and ſubſequent to the Recovery are very different. The former is ſubject to all the incumbrances of his anceſtors: the latter is a new purchaſe, diſcharged of all thoſe incumbrances. If the eſtate is in its nature altered, the previous will cannot operate upon it. If the intention is to make a ſecurity to the mortgagee, the form of the conveyance is nothing. What other intention can be preſumed in this inſtance? This deed conſidered with that view is valid and effectual: with a view to barring eſtates tail, remainders and reverſions, it is futile and nugatory.

Suppoſing this deed a revocation, the ſecond point, upon the length of time, is not now to be determined: but the parties ought to be ſent to law. It would be very unjuſt to decide that queſtion, when the defendants have entered into no caſe, have ſtated no circumſtances; and it does not appear, whether any thing has been done, amounting to an actual ouſter. Certainly the poſſeſſion of one tenant in common is *primâ facie* the poſſeſſion of both; but not, if an actual ouſter can be made out. The only evidence conſiſts of theſe letters; which certainly amount to a knowledge of the claim of the others, and a wiſh, that it ſhould be aſſerted. But, how can that bind the parties entitled to the

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(*a*) 1 *Roll. Ab.* 616. *Pl.* 3.

the inheritance? There is nothing elſe to mark any thing like a claim made. The anſwers to theſe letters were merely in general terms, acknowledging the receipt of them. A long period had elapſed antecedent to the date of theſe letters, from 1764 to 1786, reſpecting which there is not the leaſt evidence of any aſſertion of the plaintiff's claim. The letters amount to nothing more than a knowledge, that there was ſuch a claim in the minds of the plaintiffs; but are nothing like an acknowledgment of the juſtice of that claim; inviting them to have their claim legally diſcuſſed and decided; not by any means acquieſcing in it. It was not competent to the author of them, nor did he intend, to bind the inheritance. It would be very improper to get rid of the objection from the length of time by any looſe communication. Some ſtep ought to have been taken for the purpoſe of agitating the queſtion. Is it juſt for the Court to interpoſe to deveſt theſe rents, in the enjoyment of which the defendants and their anceſtors have been ſince 1764 without one application? They have been counting upon this property as their own. The conſequence of that in forming connections in life is very material; and, without proving ſettlements, *&c.* ſhews the fallacy of ſaying, there is no injury. Though length of time alone is not a bar in this Court, as at law, yet there is a ſtrict analogy in this Court to the Statute of limitations; the principles of which were in truth derived out of this Court, and only adopted in Courts of law. In caſes of debt or legacy the admiſſion of the party is very deciſive evidence: but that is upon this ground; that being matter of privity between the parties, the remedy is barred only by the preſumption of payment. In this caſe, upon the aſſertion of a legal claim, no ſuch preſumption can be raiſed. The only queſtion then is, whether upon grounds of public policy the Court will allow a party at this diſtance of time to ſet up a claim, in which he had not ſufficient confidence to make it the ſubject of inquiry in a Court of Juſtice. It would ſhake the ſecurity of all the property of the country. Poſſeſſion for twenty years by the mortgagee would have barred the mortgagor. It is therefore only by the act of the defendants that there is any ſubject of claim. The decree, that was made in this cauſe, is deciſive evidence, that the attention of the parties was drawn to this will at that time: but this point of revocation did not enter into the imagination of any one concerned for the family. The de-

fendants

fendants therefore are entitled to ſay, there was ſome good reaſon, inducing them not to diſpute this will then; and therefore they ſhould be precluded from raiſing the queſtion now. Republication may be preſumed. Lord *Kenyon* has directed a ſurrender to be preſumed within twenty years. Why ſhould not theſe defendants have the benefit of any legal defence they may have? Upon a pure legal queſtion, where there is any probability, that there may be a legal defence, the Court will not determine it. Therefore, if the Court is with the plaintiffs upon the point of revocation, the truſtee *Lawrence* ought to be directed to convey to the uſes of the deed, generally; in order that the defendants may not be deprived of any defence they may have at law from the ſtatute of limitations, or otherwiſe.

Upon the third point, ſuppoſing the rents in queſtion were ſubject to the payment of the debts, or liable to contribution, in conſequence of the ſilence of theſe parties it may be impoſſible to have juſtice done in that account. *Donne* v. *Lewis* is nothing like this caſe. That was a purchaſe ſubſequent to the will, and a queſtion between volunteers. Here an eſtate, that ought to be charged in proportion at leaſt, has ſlipped out of the will by accident. The conſequence of the laches of the plaintiffs is, that the defendants are without the means of enforcing their right in this reſpect with the leaſt proſpect of juſtice.

Reply—The principle as to revocation is not to be diſputed; that the intention is of no conſequence: if a plain unequivocal act has been done, taking out of the deviſor the eſtate he had in him, the will cannot operate, notwithſtanding an expreſs declaration, that what he was about was not intended to be a revocation; and the reaſon is, that he had not in him at his death the eſtate he meant to deviſe. Creating a ſecurity for the mortgage upon theſe fee-farm rents by a term, having on the ſame day executed another deed, merely creating a term for the ſame purpoſe upon another part of his eſtate, does he ſtop there as to theſe fee-farm rents? No; he declares other eſtates beyond that, and quite beſide that purpoſe. If he has done any thing beyond that, if he has taken a new eſtate, his intention is of no conſequence. What is meant by ſaying, the equity of redemption was reſerved? A mortgage in fee is at law a conveyance upon condition. Nothing

thing is reſerved. The equity of redemption is the creature of this Court. The plaintiff's caſe reſts upon the diſtinction of going beyond the purpoſe of making a ſecurity. In Lord *Lincoln's* caſe it was not attempted to argue, that if he had the legal eſtate in him, it would not have been a revocation: but it was contended, that there was no revocation; as, having made a previous mortgage he had only the equitable eſtate. It was however decided otherwiſe. The deed had its effect; conveying the equitable eſtate; that, which he had in him. No purpoſe could be more particular. How does that apply to this caſe? This conveyance was for the purpoſe of ſuffering a recovery; which never was ſuffered. They muſt go farther, beyond the conveyance to *Lawrence*, and look to the purpoſe. It was ſaid, the deed was executed under a miſtake; and therefore ought not to operate. There is no authority, that, if a will is revoked at law by a miſapprehenſion of the deviſor, this Court would ſet it up as between volunteers, or rectify it for the deviſee againſt the heir at law, the favourite of the Court. If the eſtates are the ſame in point of intereſt and quantity of eſtate, ſtill this is a new eſtate; and if ſo, the effect is a revocation, whatever the quantity or intereſt may be. For the purpoſe of the argument, admitting, he acted under a miſtake, it is a revocation, upon the principles contained in Lord *Hardwicke's* notes, ſtated by the Lord Chancellor (*a*) in *Brydges* v. *The Ducheſs of Chandos*; if in fact he has gone beyond what was neceſſary for the mortgage.

As to the objection from the length of time, *primâ facie* the plaintiffs are entitled; and it lies on the defendants to ſhew, why they are not. No analogy to a legal bar has been ſhewn. It is ſaid, a republication of the will may be preſumed. Has that ever been done? Why was not that ſuggeſted in 1787? If it had been mentioned, could it have been countenanced a moment? Such a preſumption would be moſt extraordinary; and has never been made in the caſe of a purchaſe ſubſequent to the will; upon which judges have been ſo much embarraſſed, and obliged to decide in all probability againſt the intention. *Bunker* v. *Cooke* (*b*) and thoſe caſes would not have ariſen upon this hypotheſis. The Statute of Frauds (*c*) might be got rid of in the ſame way. Lord

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(*a*) *Ante*, vol. 2. 431, 432.

(*b*) *Fitzg.* 225. *Holt.* 236. 746.

(*c*) 29 *Cha.* 2. *c.* 3.

Manſfield endeavoured to go as far as any one in preſuming; and Your Honour is alſo liberal in that reſpect. Lord *Manſfield* ſaid, he would preſume even an Act of Parliament: but it is impoſſible to preſume a clauſe in an act of Parliament; which act is produced; and this is an attempt to raiſe a preſumption with regard to a will, which will is produced, and in oppoſition to their own decree. Upon a writ of right by an heir at law could the Jury without any ground, in the abſence of all evidence, merely in reſpect of the poſſeſſion of the defendant, preſume, that a will was duly atteſted, which will was produced, atteſted by two witneſſes only? The Court is required *per ſaltum* to conclude, this was an adverſe poſſeſſion. In *Doe* v. *Proſſer* (*a*) the Court of *King's Bench* certainly preſumed upon 36 years' poſſeſſion by one tenant in common an ouſter of his companion. Lord *Manſfield* there ſays, "So, in the caſe of tenants in common; the poſſeſſion of "one tenant in common, *eo nomine*, as tenant in common, can "never bar his companion; becauſe ſuch poſſeſſion is not adverſe "to the right of his companion, but in ſupport of their common "title; and by paying him his ſhare he acknowledges him co-"tenant. Nor indeed is a refuſal to pay of itſelf ſufficient with-"out denying his title."

Apply that poſition to this caſe. From 1764, as the plaintiffs contend, theſe parties were entitled to poſſeſs in thirds. The property does not admit of actual entry: but an agent was receiving from 1764 to 1788. Where is the adverſe poſſeſſion? The doubt was merely as to the right of the plaintiff from the circumſtance of her being out of poſſeſſion. *Eldridge* v. *Knott* (*b*) is to the ſame effect. This caſe has circumſtances to explain the apparent acquieſcence. They were cloſely connected in blood and friendſhip. The decree only directed the will to be eſtabliſhed; which without doubt was to be eſtabliſhed. The deviſe is not of theſe fee-farm rents ſpecifically, but generally, of his eſtates. If there had been a Report, that theſe rents paſſed, and the queſtion of revocation had ariſen upon farther directions or exceptions, there would have been ſomething of *res judicata;* which might be operative.

(*a*) *Cowp.* 217.

(*b*) *Cowp.* 214.

Next as to the account of the rents and profits demanded, a truſtee is bound to account from any period. So in the old action of Aſſize the party is bound to account for any period for rents by-gone, received by him wrongfully. By the Statute of *Ann* (*a*) a tenant in common may ſue out a Writ of Account. Before that they were under the neceſſity of coming into Equity; and the uſual decree was an account. But the Statute has not taken away the equitable juriſdiction. Neither has it taken away the Writ of Aſſize, and in that certainly you may recover in damages beyond the ſix years the whole wrongfully received. No Statute of Limitations applies to it: *Bro. Abridg.* (*b*) referring to 33 *Hen.* 6. and the Statute of *Gloceſter*. In any other action certainly you cannot recover beyond the ſix years. The form of the action gives the extraordinary right. The aſſurance in this caſe, that the rents ſhould be held for the right owners, and the propoſal in the letter, that they ſhall be laid out and produce intereſt, naturally produced a ſuſpenſion of the claim. If ever there was a caſe, in which the Court would recur to its old doctrine of making a Receiver account ſtrictly as truſtee, this is the caſe. As to the inconvenience, it is not to be ſuppoſed after admiſſions of the claim from time to time. No ſuch fact, as that there was any ſettlement, is alleged or proved in the cauſe: nor is there any ground for ſuch a ſuppoſition. This claim was ſet up by the father of the plaintiff. That is admitted by the anſwers. It does not therefore reſt upon the letters. They knew, Mr. *Fearne* and another eminent Counſel had given opinions in favour of it.

As to the effect of the decree, that this is a revocation, to obtain even an inquiry as to that there muſt be ſome foundation laid, to ſhew, that a deſcended eſtate is applicable before the remainder of the deviſor's eſtates; which in fact have borne the burthen of the debts. The reaſoning in *Donne* v. *Lewis* is completely in point. Lord *Thurlow* took a conſiderable time and great pains in endeavouring to reconcile the previous caſes; which are not eaſily to be reconciled. Your honour followed that caſe exactly in *Manning* v. *Spooner* (*c*). This is very different from a mere charge. Stronger words cannot be uſed. They are ſtronger than *Manning* v. *Spooner*; in which the charge covered the whole

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(*a*) 4 *Ann*, *c*. 16.

(*b*) 1 *Bro. Abr.* 50. Tit. *Aſſize*, Pl. 10.

(*c*) *Ante*, vol. 3. 114.

eſtate: but here is an exception of a particular part; which ſhews, he was forming a judgment between one part of his eſtate and another; making a deſtination of one part to his debts before another. The effect is leaving the whole of the debts upon that part.

The Court during the argument admitting, that the parties were aware of the claim, expreſſed a ſtrong opinion againſt granting the account, at leaſt farther back than ſix years (*a*).

The Maſter of the Rolls alſo obſerved upon the point of revocation, that as to a deed executed by miſtake he did not admit that to be a revocation; and as to a deed obtained by fraud, though certainly Lord *Thurlow* reverſed the decree in *Hawes* v. *Wyatt* (*b*), (and his Honour ſaid, he would not ſet his judgment in competition with the high authority of that noble Lord) yet the caſe of *Hick* v. *Mors* (*c*) was a ſtrong corroboration of the decree at the *Rolls;* which proceeded upon this; that though the ſon was induced by his father to execute the deed, it was a revocation; as the ſon intended, the will ſhould not operate: it would be different, if it was ſuch a fraud as making him execute one deed, when he thought he was executing another.

March 21. 1801.

The Maſter of the Rolls—This caſe is attended with very peculiar circumſtances. The bill is filed in 1796 for an account of fee-farm rents; which became due to the preſent plaintiffs, or thoſe, under whom they claim, in 1764. After a poſſeſſion from 1764 to 1796 this bill is brought. Upon ſuch a bill, and when, as it is ſaid, no leſs than three deſcents have been caſt, and thoſe perſons have been receiving and acting upon the property, the Court undoubtedly will not do any thing to further ſuch a claim: but if by the rules of equity, as well as of law, for a queſtion of law has been raiſed, they are entitled, they muſt prevail: to what extent, will be matter of further conſideration, when the cauſe comes

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(*a*) As to the limitation of accounts ſee *Drummond* v. *The Duke of St. Albans, Bromley* v. *Holland, Acherly* v. *Roe, Reade* v. *Reade, Chambers* v. *Goldwin, ante,* vol. 5. 433. 610. 744. 834.

(*b*) 3 *Bro. C. C.* 156.

(*c*) *Amb.* 215.

back; for I do not think myſelf at liberty to decide it entirely at preſent.

Abraham Weekes being ſeiſed under this ſettlement, with the reverſion in fee to himſelf, upon the 24th of *May* 1750 makes his will; upon which the queſtion ariſes.

In *November* 1750 he takes it into his head, for what reaſon I cannot tell, to make this deed; thinking another Recovery neceſſary; and he begins with making a mortgage to *Mellicent Neate* for 1000 years; and for the further and better ſecuring the payment of ſaid ſum of 5,500*l.* with intereſt, and for the barring all eſtates tail, and all reverſions and remainders thereupon expectant in ſaid fee-farm rents, and for limiting and aſſuring the ſame for ſuch uſes, upon ſuch truſts, and for ſuch intents and purpoſes, as hereinafter expreſſed, *Abraham Weekes* and his wife convey theſe fee-farm rents, being part of the eſtates compriſed in the will, to *Charles Lawrence*, his heirs and aſſigns, to make a tenant to the *præcipe*, that a Recovery might be ſuffered; to enure to *Mellicent Neate* for ſecuring the mortgage; and, after the determination of the term, to the uſe of *Abraham Weekes* for life; remainder to his wife for life; remainder to *Abraham Weekes*, his heirs and aſſigns.

He ſeems to have very much perplexed himſelf with reſpect to his intereſt in theſe eſtates; for in truth he had no right to ſuffer a Recovery. He was a mere tenant for life of the eſtates; and had no right to bar the eſtates of his firſt and other ſons. I ſuppoſe, he took it for granted, he ſhould have no children. It is ſaid, and, I believe, his object was merely to give effect to the mortgage. The firſt thing to be conſidered is, what paſſed under his will; as it ſtood before the Recovery. Unqueſtionably, only the remainder in fee expectant upon the deaths of himſelf and his wife without iſſue, charged with the payment of his debts. It muſt not be forgot, that by this deed, if it is to have any operation, the will would to a certain degree be altered; for nothing is ſaid in it about the debts; which by the will are firſt charged upon all his eſtates.

The teſtator died in 1755; leaving his three ſiſters his coheireſſes at law. His widow married *James O'Donnell*. She had both under her marriage ſettlement and under this farther ſettlement in 1750 an eſtate for life; and ſhe filed a bill againſt *Mellicent Crop* and *Mary Harmood* and their huſbands; praying, that the will might be eſtabliſhed, the debts paid, *&c.*; which was done under a decree.

Mrs. *O'Donnell* died in 1764; and then aroſe the claim of the preſent plaintiffs; inſiſting, that the will was revoked by the ſubſequent deed. From that time the plaintiffs' title accrued. But it is ſaid, it is not barred; for it is an equitable title; the legal eſtate having paſſed by the deed to *Lawrence;* and that it was a revocation of the will both at law and in equity; and the legal eſtate remained in *Lawrence*, (the Recovery never having been ſuffered) as a truſtee for the heirs at law of the teſtator; and therefore that, if ever entitled, they are entitled from the year 1764.

Unqueſtionably it cannot be denied, that ſome idea of this claim was entertained; and letters were produced from Dr. *Taunton*, entitled in right of his wife, which ſhew, they had an idea of this claim of the plaintiffs to theſe rents: but it is equally clear, that the plaintiffs did not receive them. They permitted them to be received by perſons in oppoſition to their claim; which was never aſſerted by any ſuit, till this bill was filed in 1796; inſiſting, that as theſe are fee-farm rents, and the legal eſtate in *Lawrence*, as truſtee for them, they are not barred by any length of time; but have a right to the account. I ſhould have been extremely glad to have diſmiſſed the bill now; for I ſhould be very ſorry to have it underſtood to be the rule of this Court, that there is no limitation whatſoever to truſt eſtates; and that, let the legal eſtate once get into a truſtee, the *Ceſtuy que* truſt may permit others to enjoy the property; and come to this Court at any diſtance of time for an account. I do not know, that this Court will ever act upon ſo very broad a principle.

But ſeveral objections were taken to this claim. Firſt, it was inſiſted, that under all the circumſtances this deed was not a revocation of the will either at law, or at leaſt not in equity.

Wherever the whole legal eſtate is conveyed, whether for a partial or general purpoſe, with the ſingle exception of the caſe of partition, a Court of Law has nothing to do with the purpoſe; but is to ſee, whether the intereſt remains the ſame in the deviſor as at the date of the will: if not, whether the purpoſe is partial or general, by way of charge, or not, it is a revocation at law.

Firſt, to conſider, whether it is a revocation of the will at law. I do not think, much doubt can be entertained of that. I, for one, have no difficulty in ſaying, that, wherever the whole legal eſtate is conveyed, whether for a partial or a general purpoſe, with the ſingle exception of the caſe of *Luther* v. *Kidby*, which I ſhall have occaſion to conſider hereafter, a Court of Law has nothing to do with the purpoſe; but is to ſee, whether the intereſt remains the ſame in the deviſor, as it did at the date of the will; and if not, without queſtion, whether the purpoſe is partial or general, whether it is by way of charge, or not, it is a revocation at law.

But then it is inſiſted, that the Court may under the circumſtances preſume a republication of the will. I will not take away from the defendants any advantage they may have from ſuch a preſumption: but it muſt be remembered, that is a mere queſtion at law; with which this Court can have nothing to do.

The queſtion therefore is, whether this is a revocation in equity. It was ſaid, if the deed is for a partial purpoſe, if the mere purpoſe was to ſecure this mortgage, its being done by Recovery will not make any difference; that, if the object of the conveyance is merely to effectuate the mortgage, it is no more a revocation in equity than a ſimple mortgage would be.

This brings before the Court a queſtion, that has of late been ſo much agitated, and upon which ſo much argument has been uſed; and, as I believe my opinion in the caſe of *Williams* v. *Owens* (*a*) has been in ſome degree miſunderſtood, I am very anxious to explain it; and it bears ſuch an analogy to the preſent caſe, that in ſtating my opinion of that caſe, and comparing it with the preſent caſe, I ſhall ſhew the ground of my opinion upon this caſe alſo. I obſerve, in the Report of *Cave* v. *Holford* (*b*) it is ſaid by the then Attorney General, that it is impoſſible to reconcile *Williams* v. *Owens* with *Brydges* v. *The Ducheſs of Chandos*. There is this diſtinction between them: *Williams* v. *Owens* is, I take it, a ſtrict literal execution of the articles, by which the party was bound, and nothing more: the deed in the other caſe differs from them.

(*a*) *Ante*, vol. 2. 595.

(*b*) *Ante*, vol. 3. 684.

But whether they are reconcileable, or not, it may be proper to ſtate the ground of that caſe; as ſome expreſſions in the Report are certainly inaccurate. At the end of the judgment I am ſtated to have ſaid, "that the teſtator's acquiring the legal intereſt makes "no difference." I ſhould have ſaid, and the diſtinction was marked by Mr. *Romilly* in the argument, that the teſtator having modelled his legal intereſt in the eſtate in conformity to the articles makes no difference. It is certainly an inaccurate expreſſion to ſay, that the teſtator acquired the legal eſtate. It never was out of him.

It is unneceſſary to go over the doctrine of revocation; as it has been ably ſtated by the Judges of the Court of Common Pleas in *Goodtitle* v. *Otway*. I entirely agree with the three Judges, who held the deed a revocation of the will as to all the eſtates: but I think with Mr. Juſtice *Buller*, the articles ought not to have formed any part of the ſpecial verdict. The queſtion in a Court of Law is ſimply, whether the legal deviſe is revoked by the deed. All other queſtions, as to the partial purpoſe, &c. are merely equitable queſtions. I perfectly agree with all the determinations, that have taken place in Courts of Law on queſtions of revocation, except *Luther* v. *Kidby*; which with great deference to the authority, by which it was decided, I cannot but conſider as anomalous; and I perceive from the Report of *Goodtitle* v. *Otway*, that Mr. Juſtice *Heath* looks upon that caſe in the ſame light that I do. The queſtion then is, in what caſes a Court of Equity has determined, that a deed clearly revoking a will at law is not in equity a revocation, or is only a partial revocation; and I take it to be fully eſtabliſhed now, that, if the deed is only for the partial purpoſe of introducing a particular charge or incumbrance, and does not affect the intereſt of the teſtator beyond that purpoſe, it is only a partial revocation in equity; and though the deviſees under the will take no eſtate, and the eſtate is veſted in the mortgagee or the truſtee for a particular purpoſe, and, after that purpoſe ſhall be anſwered, the uſe is declared to be for the teſtator and his heirs, yet a Court of Equity being ſatisfied, that there was

The queſtion in a Court of Law as to the revocation of a will is only, whether the legal deviſe is revoked by the deed. All other queſtions as to the partial purpoſe, &c. are merely equitable queſtions.

The caſe of partition is anomalous.

Where the deed, clearly revoking the will at Law, is only for the partial purpoſe of introducing a particular charge or incumbrance, and does not affect the intereſt of the teſtator beyond that purpoſe, it is only a partial revocation in Equity; and though, after that purpoſe is anſwered, the uſe is declared for the teſtator and his heirs, a Court of Equity will hold the party a truſtee for the deviſees; as upon a deviſe of an equitable eſtate, and a ſubſequent conveyance of the legal eſtate to the deviſor and his heirs.

1801. Harwood v. Oglander.

no other object but the partial one, will hold the party a truſtee, not for the heir, but for the deviſees. Lord *Hardwicke* expreſsly laid it down, that, if a man deviſes an equitable eſtate, and afterwards takes a conveyance of the legal eſtate to him and his heirs, though the conſequence will be, that the eſtate will deſcend upon the heir, the heir will be only a truſtee for the deviſees.

Now, to apply theſe principles to the caſe of *Williams* v. *Owens* and to this caſe. In *Williams* v. *Owens* it is admitted, that if the teſtator had died without having conveyed according to the articles, his heir at law, to whom the legal eſtate would have deſcended, would have been a truſtee for the uſes of the articles, and, after they were ſatisfied, for the deviſees. It is likewiſe admitted, that the teſtator would have been liable to be called upon to convey according to the articles. What did he convey by the will? At Law, the whole legal eſtate: in Equity, only the remainder in fee. In Equity he remained ſeiſed as before; and the conveyance being only for a particular purpoſe, and in conformity to the obligation he was under, when he muſt be ſuppoſed to act under the articles, it would be a perverſion of the principles, upon which theſe caſes are determined, to conſider it a revocation in Equity.

This is upon the ſuppoſition, that Lord *Hardwicke* is right in holding, that, if a man deviſes an equitable eſtate, and afterwards takes a conveyance to him and his heirs, he does not revoke the will. It is admitted, that if the teſtator, inſtead of covenanting, that he would convey according to the articles, had before the date of the will conveyed to a truſtee upon thoſe truſts, and after the will had called upon the truſtee to convey upon the truſts, the will would not have been revoked: yet without queſtion the legal eſtate would have deſcended to the heir. The Court would have controlled the law; and would have held the heir to be a truſtee for the deviſees. What diſtinction in common ſenſe can there be between the two caſes? In *Williams* v. *Owens* the teſtator, inſtead of conveying according to the articles before the will, gave the eſtate ſubject to the articles by the will; and then, as he was bound to do, conveyed the legal eſtate ſo as to leave himſelf at law, what he had before in equity, the remainder in fee. It is ſaid, that the legal eſtate paſſed by the will: and that a conveyance of the legal eſtate after a deviſe is a revocation at law; and why ſhould equity control the law? The reaſon, why a deed revokes a will, is, that a Court of Law cannot look at the articles. But a Court of Equity attends to both; conſiders the intereſt at the date of the will and of the deed; and upon all the circumſtances determines, whether that, which without the intervention of circumſtances, (by which the intereſt in equity is diſtinct from the legal intereſt) muſt be held a revocation of the beneficial as well as the legal intereſt, ſhall in equity be no revocation of the will, ſo far as it affects the actual intereſt in a Court of Equity.

Deviſe not revoked in Equity by a mortgage in fee or a conveyance in fee for payment of debts; though after the debts are paid the deviſor takes a conveyance to him and his heirs.

To give ſome examples. *A.* ſeiſed in fee, deviſes to *B.* in fee, charged with the payment of debts; then makes a mortgage in fee; then pays that off; and takes back the eſtate from the mortgagee to himſelf and his heirs. This would fall directly within Lord *Hardwicke*'s rule; that taking the legal eſtate from a truſtee is not a revocation. By the mortgage there is a complete revocation at law: but a Court of Equity ſays, he ſtill remains poſſeſſed of the eſtate in equity, ſubject to the debt ſecured by the mortgage. Therefore the mortgagee ſhall be a truſtee for the deviſee; the mode taken for the ſecurity of the debt not being regarded in equity; and the deviſor being complete owner, as before, in equity, ſubject only to the mortgage. Put the caſe, not of a mortgage; for it may be ſaid, that in equity is only a chattel intereſt; and that he is ſeiſed of his former eſtate: ſuppoſe, after the deviſe, a conveyance of the whole fee, upon truſt to ſell and pay debts; the ſurplus, if any, for the teſtator and his executors; and the remainder of the lands unſold, for him and his heirs. It has been determined by Lord *Thurlow* and other great judges to be no revocation in equity. Suppoſe afterwards, the debts being fully paid, the truſtee is called upon by the teſtator, and conveys to the teſtator and his heirs: that would be clearly no revocation. Now in this caſe Equity takes upon it to make the heir, upon whom the eſtate deſcends by virtue of a conveyance, by which his anceſtor acquired an entirely new eſtate, a truſtee for the deviſee under a will made prior to his acquiſition of that legal eſtate. That, I admit, is a ſtrong caſe; and perhaps it would have been as well for a Court of Equity to have refuſed to aſſiſt the deviſee againſt the heir in ſuch a caſe; and yet unqueſtionably the principle is ſettled and eſtabliſhed, that the heir is a truſtee for the deviſee. I admit the difference in the caſe of a will and a conveyance afterwards for a partial purpoſe, the teſtator then dying without taking back the legal eſtate; for a Court of Equity has only to decide, to whom the beneficial intereſt belongs. A Court of Equity declares, he did not mean to revoke; and therefore holds him a truſtee for the deviſee, and not for the heir; and directs a conveyance.

Conſider then, what circumſtances make a revocation, which is clearly a revocation at law, no revocation in equity. What is a revocation in equity? They are fully ſtated in *Cave* v. *Holford*, and in the note of Mr. Serjt. *Williams* in his very valuable edition of *Saunders*'s Reports. He there expreſſes a doubt as to what was ſaid by me as to the operation of a fine; where there is no deed to declare the uſes; and I think, he is juſtified in that doubt. The reſult of theſe caſes is, that any alteration of the eſtate, or a new eſtate taken, is at law a revocation; whether for a partial or a general purpoſe; to which circumſtance a Court of Law cannot advert: neither ought they to take any notice of articles, or covenants, charging the eſtate in equity. They have only to look at the will and the ſubſequent deed; and ſay, whether at law the old eſtate is changed and a new eſtate acquired.

Any alteration of the eſtate or a new eſtate taken, is at law a revocation, whether for a partial or a general purpoſe; to which a Court of Law cannot advert: neither ought they to take any notice of articles or covenants, charging the eſtate in Equity; but only to ſay upon the will and the ſubſequent deed, whether the old eſtate is changed, and a new eſtate acquired.

Conſider, in what caſes Courts of Equity have controlled the law; not upon the ground of a partial purpoſe only, nor upon the act being done without an intention ro revoke; for that will not authoriſe a Court of Equity to interfere. A Court of Equity has never interfered with the operation of a will and a ſubſequent deed, where the teſtator at the time of the will had the ſame eſtate at law and in equity. But where his beneficial intereſt is different from his legal one, or, where the equitable intereſt is deviſed, and the legal eſtate is not affected, and the teſtator calls upon the truſtee for his legal eſtate, though the legal eſtate deſcends to the heir, yet a Court of Equity ſays, as the whole beneficial intereſt paſſed by the deviſe, and the truſtee, if the deviſor had died without calling for the legal eſtate, would have been a truſtee for the deviſee, the mere circumſtance of the deviſor's cloathing himſelf with the legal eſtate ſhall not operate as a revocation of the deviſe of the beneficial intereſt. Therefore they hold the heir a truſtee for the uſes of the will. This is expreſsly laid down in *Parſons* v. *Freeman*, and is not denied in any caſe, that I am aware of. In that caſe, it is to be obſerved, the teſtator had no eſtate at all at law, upon which his will could operate. Therefore the conveyance from the truſtees was a completely new eſtate. Suppoſe, a man ſeiſed in fee makes his will, and then conveys his eſtate to a truſtee for the payment of debts: the law has nothing to do with the purpoſe of the deed; but can only judge of the legal operation of the deed. But equity ſays, the eſtate is not taken out of the teſtator ſubſtantially: he has the ſame eſtate in equity as before; and though the mode amounts to a revocation, yet ſubject to thoſe debts he remains in equity maſter of the eſtate, as before; and the will continued to operate upon his intereſt. In fact they conſider him ſtill owner in equity; and therefore, if he calls for the legal eſtate, by which at law he becomes the purchaſer of a new eſtate, not affected by the will, yet equity holds the heir to be a truſtee for the deviſees, juſt as if the legal eſtate had remained in the truſtee.

This doctrine is applicable alſo to this caſe. The principles are, firſt, that equity will never control the law; except, where the teſtator has at the date of the will a different intereſt in equity from that, which he has at law; and deviſes that beneficial intereſt; and then only takes the legal eſtate, without any new modification or alteration: ſecondly, where he has the complete legal and beneficial eſtate at the date of the will; and afterwards deveſts himſelf of the legal eſtate; but ſtill remains owner of the equitable intereſt; as in the caſe of a mortgage or a conveyance for payment of debts: if he dies without taking a conveyance of the legal eſtate, his equitable intereſt ſtill continues; and if he has taken back the legal eſtate, that alone will not revoke the deviſe of the equitable intereſt. Theſe rules are clearly deducible from the ſeries of determinations of great judges in equity. To apply them to *Williams* v. *Owens*. If, inſtead of articles, the teſtator had before marriage conveyed to a truſtee, in truſt for himſelf till the marriage, then for himſelf for life; remainder to the iſſue in tail; remainder to himſelf in fee; then made the will; and then had called upon the truſtee to convey; and he had conveyed, it is admitted, that would be a complete revocation at law; but as clearly it would not be a revocation in equity; and the heir muſt convey to the uſes of the will. In principle that does not differ

Equity never controls the Law upon revocation, except, where the beneficial intereſt, being diſtinct from the legal eſtate, is deviſed, and the deviſor afterwards takes the legal eſtate without any new modification or alteration: 2dly, Where having the complete legal and beneficial eſtate at the date of the will he deveſts himſelf of the legal eſtate; but remains owner of the equitable intereſt; as in the caſe of a mortgage or a conveyance for payment of debts.

from the caſe of *Williams* v. *Owens*. The deviſor was bound by the articles; and he might have been compelled to convey accordingly. That would not revoke his will. Then it is ſtrange to ſay, if the conveyance was taken from a truſtee, it would be no revocation, but, if according to his obligation he himſelf conveyed to the ſame uſes, it would be a revocation. No one can deny, that articles are in equity equal to a conveyance. No one can deny, that he remained a truſtee to the uſes of the articles; and muſt have conveyed accordingly, if he had been called upon. Having the whole legal eſtate in himſelf, for the legal eſtate was entirely unaffected, inſtead of being under the neceſſity of calling upon a truſtee to convey, he conveys himſelf according to the articles. Is that to be a revocation, when, if he had happened to have conveyed to a truſtee, inſtead of entering into articles, a conveyance from the truſtee would not have had that effect? Such a determination, if it does not reverſe the determinations, which have hitherto prevailed in equity, will in my opinion overturn every principle, upon which they have been decided.

I have entered much at large into this queſtion; as I am anxious, that the grounds of my opinion upon revocation in equity ſhould not be miſunderſtood; and, as they apply to the preſent caſe, I thought this a proper opportunity to ſtate them at large.

To apply them to this caſe. It was contended, that this deed was for a partial purpoſe, and no revocation: but I am of opinion, the mode he took was clearly a revocation at Law, provided any eſtate paſſed; and there was no republication. If the deviſor conveys for the purpoſe of ſuffering a Recovery and thereby taking back to himſelf a new eſtate, it is clearly a revocation at Law as well as in Equity. It is ſaid, and I think it is probable, that the only object of the intended Recovery was to give effect to the mortgage. That circumſtance alone will not do, if he does it by way of Recovery and taking back a new eſtate. Equity will not interpoſe, except in the caſes I have ſo fully enlarged upon. I am of opinion, this deed is a revocation both at Law and in Equity; whatever was the intention of the Recovery intended to be ſuffered. The conſequence is, unleſs there was a republication, the will is revoked. Conſequently the right to the fee-farm rents deſcended upon the heirs; and they have forborn their claim all this time. I ſhall not aſſiſt the plaintiffs. The other ſide, one would think, would have come here to reſtrain them from proceeding at Law. I do not mean to debar them from any right they may have to reſiſt any decree whatſoever being made, after theſe queſtions ſhall be determined at Law; for it was determined by Lord *Kenyon* in *Barber* v. *Geaſt* (*a*), that it is not a neceſſary conſequence that the Court will not ultimately determine againſt the plaintiffs in Equity, becauſe the bill has been retained; and, if I am not miſtaken, Lord *Kenyon* diſmiſſed that bill. At preſent I do not think myſelf at liberty to diſmiſs this bill. At the ſame time I am not at liberty to aſſiſt the plaintiffs. The utmoſt I can do is to retain the bill, with liberty for the plaintiffs to bring an action in the name of *Lawrence*, to whom the eſtate was conveyed for the particular purpoſe. Then they will have the opportunity of taking the opinion of a Court of Law, whether there is a revocation at Law, or, whether a Court of Law will preſume a republication from this long poſſeſſion. That is the only decree I ſhall make; leaving open the other point, whether under the circumſtances the plaintiffs are entitled to any account, or to what length of time they may may go back; for it was ſtrongly preſſed for the plaintiffs, that they have a right to recover in a Court of Equity theſe rents from the very firſt. That is perfectly alarming, if a man having a truſt eſtate may lie by for any length of time, permitting others to retain the whole profit, and then come for an account. There muſt be ſome limitation.

It is not a neceſſary conſequence, that the bill will not be diſmiſſed, becauſe it has been retained for the purpoſe of a trial at Law.

I am of opinion, that, if this is a revocation at Law, and I have very little difficulty at preſent in ſaying it is, it is alſo a revocation in Equity: but I by no means wiſh to have it underſtood that after ſo long an acquieſcence the plaintiffs are entitled to relief in a Court of Equity. Retain the bill; with liberty for the plaintiffs to bring ſuch action or ſuit as they may be adviſed.

(*a*) 2 *Bro. C. C.* 61.

1801.

Rolls.
July 3. 6.

No tacking againſt creditors or aſſignees for valuable conſideration.

Truſtee not charged with a loſs by the failure of the banker to the agent; in whoſe hands the money was depoſited pending a tranſaction for the change of a truſtee.

No lien under the circumſtances.

Upon farther directions a queſtion decided by the Maſter was opened, without any exception: all the circumſtances appearing on the Report.

ADAMS *v.* CLAXTON.

THE bill was filed by creditors of *William Wood*, for the purpoſe of obtaining the benefit of a deed, conveying all his eſtate to *Adams* and *Claxton*, two of his creditors, in truſt for the benefit of his creditors. The accounts were directed; and the Maſter by his Report ſtated, that the late defendant *William Claxton* under an aſſignment made to him by the teſtator *Wood* of a policy of inſurance upon his life for 1,386 *l.* 10 *s.* for ſecuring 1,000 *l.* advanced by *Claxton*, received the money from the Inſurance Office upon the death of *Wood*; and he claimed to retain out of the ſurplus 319 *l.* 10 *s.* 7 *d.* for principal and intereſt due upon a ſubſequent promiſory note for 300 *l.* payable a year after date. That queſtion was ſubmitted by the Maſter to the Court.

Another queſtion aroſe upon the following circumſtances, appearing on the Report. *Adams* deſiring to be diſcharged from the truſt, pending the tranſaction for the change of truſtees the agent for the truſt in *April* 1796 received three payments on account of the truſt, to the amount of 252 *l.* 15 *s.* 8 *d.*; which ſum was depoſited with *Nightingale*, the agent's banker, until another truſtee ſhould be appointed, or ſome banker ſhould be agreed on to receive the truſt money. This money was paid in in the agent's name as a temporary matter only. *Nightingale* ſtopped payment. The deed contained no covenant or condition for depoſiting the money received under the truſt in any bank, until it ſhould be diſtributed. *Wood* died a few days after the execution of the deed. The queſtion was, whether the truſtee was perſonally liable to that loſs.

The third queſtion aroſe upon the following facts. The teſtator *Wood* effected an inſurance for 1,000 *l.* upon his own life on the 6th of *January* 1790. Upon that policy the following indorſement appeared in the handwriting of the teſtator *Wood*:

"No. 9964. 6. *January* 1790. Policy upon the life of *William* "*Wood* for 1,000 *l.* annual premium 30 *l.* 13 *s.* payable 5th *Ja*-"*nuary*. *R. B.*"

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The Report ſtated, that it was alleged before the Maſter, that the two laſt letters of that indorſement were intended to ſignify the initial letters of the name of *Richard Boyfield*; under whoſe will the teſtator *Wood* was principal acting, as well as ſurviving, executor; and to whoſe eſtate he had as executor become conſiderably indebted. The Policy was diſcovered among *Wood*'s papers, delivered up by him in *February* 1796 upon his making the aſſignment of his effects to truſtees for his creditors; and annexed to the Policy was found the following paper, all in *Wood*'s handwriting: "The annexed policy of inſurance from the Equi-"table Inſurance Office *Blackfriar*'s Bridge for ſecuring to my "executors, adminiſtrators, or aſſigns, the payment of 1,000*l.* "upon the event of my death, is hereby agreed and intended by "me to be veſted in *Mary Woodyear*, of *Camberwell*, *Surry*, wi-"dow; in truſt to lay out the ſame and apply the principal to-"gether with the produce of 2,500*l.* 3 *per cent.* Conſols, now in "the Bank in my name but bought by me as executor for the uſe "and benefit of the *Boyfield* family, and together with the rents "of the late *Richard Boyfield*'s eſtate for the benefit of Mrs. *Boy-*"*field* and ſaid Mrs. *Woodyear* for their reſpective lives and then "to be applied for the uſe of *Mary Woodyear*'s child or children "according to the will of the ſaid *Richard Boyfield*; and I do "further agree, that the ſaid *Mary Woodyear* ſhall have a lien "upon the ſaid Policy of aſſurance for the ſaid ſum of one thou-"ſand pounds to be applied for the purpoſes accordingly; and "which Policy ſo hereby aſſigned or agreed or intended ſo to be "veſted in the ſaid *Mary Woodyear* as aforeſaid is No. 9964 and "bears date the 6th day of *January* 1790: as witneſs my hand "this 18th day of *April* 1790.

Wm. Wood."

Upon the 25th of *January* 1797 *Claxton* received the money in reſpect of that Policy; which he inveſted in ſtock; and he transferred the ſtock to the Accountant General; and inveſted the dividends. The Maſter ſtated, that he conceived, the teſtator *Wood* did by the ſaid paper ſo appropriate the benefit of the Policy, that the perſons intereſted under the will of *Boyfield* have a right to the benefit of the monies ariſing therefrom.

The cauſe came on for farther directions.

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Mr. *Romilly* and Mr. *Steele for the defendant Claxton*, the perſonal repreſentative of the truſtee, upon the ſecond queſtion inſiſted, the truſtee was not to be charged with the money paid into the bank of *Nightingale*: the truſtee having dealt with this money, till the appointment of another truſtee, juſt as he would with his own property, and for the benefit of the parties. *Knight* v. *Lord Plymouth* (*a*), *Ex parte Belchier* (*b*).

Mr. *Piggott*, Mr. *Richards*, and Mr. *Hart*, *for the plaintiffs*, upon an intimation from the Maſter of the Rolls, that it would be impoſſible to charge the truſtee, gave up that point.

Upon the third queſtion they contended, that under theſe circumſtances *Wood* could not give one creditor this preference. Without delivery of the inſtrument it could not be an aſſignment. He never mentions it; keeps it for two or three years, until, executing the deed of truſt, he delivers it with his other papers to the truſtee. As againſt creditors it cannot poſſibly prevail. A lien ſprings from contract. Here the perſons, who claim this lien, knew nothing of it.

Mr. *Sutton* and Mr. *Raithby*, for the perſonal repreſentatives of *Boyfield*, inſiſted, that a preference might be given, if not with a fraudulent view, or in contemplation of bankruptcy; and that this was an appropriation: the money being marked out.

The Maſter of the Rolls aſked, how it was to operate; being admitted not to be an aſſignment. He muſt give them or ſome one on their behalf power over it. If any thing, it ſeemed to be of a legatory nature, to take effect after his death.

July 6.

The Maſter of the Rolls—Upon the firſt queſtion, the claim of the repreſentative of *Claxton* to retain beyond the 1,000 *l.* ſo much of the money as will pay him the ſubſequent debt upon a note of hand, under the circumſtances I am of opinion, that claim cannot

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(*a*) 3 *Atk.* 480.

(*b*) *Amb.* 218. *Bacon* v. *Bacon*, *Powell* v. *Evans*, *ante*, vol. 5. 331. 839. *Rowth* v. *Howell*, *ante*, vol. 3. 565. and the references. *Chambers* v. *Minchin*. *Poſt.*

not be allowed. At the time, when the aſſignment was made to the truſtees for the benefit of *Wood*'s creditors, *Claxton* had an aſſignment of this Policy to ſecure the ſum of 1,000*l.* and no more. By that aſſignment every thing, which it was competent to *Wood* to aſſign, paſſed from him to his truſtee; and conſequently the equity of redemption of the Policy ſo pledged. *Claxton* had not at that time received the money upon the policy. That might have raiſed a different conſideration; if he had the money in his hands: but he was merely a mortgagee for 1,000*l.* It is clearly ſettled, that, in the caſe of a mortgage the right to attach a ſubſequent debt to the mortgage cannot be made available againſt an aſſignee of the equity of redemption. That has been repeatedly determined in the caſe of real eſtate. *Troughton* v. *Troughton* (*a*). The anonymous caſe (*b*) 2 *Veſ.* 662. *Heams* v. *Bance* (*c*) is a ſtill ſtronger caſe; where a truſt for the benefit of creditors was raiſed by the will of the mortgagor.

With reſpect to pledges of perſonal eſtate, *Demainbray* v. *Metcalfe* (*d*) aroſe upon a pledge of jewels. The party afterwards borrowed other ſums upon a general account; and he inſiſted upon his right of redeeming the jewels upon payment of the firſt ſum only. It was held, that he muſt pay the whole: but it was admitted, that if there had been bond creditors, or in caſe of a bankruptcy, the pledge could have been retained only for the firſt ſum; and the creditor in the caſe of a bankruptcy muſt have come in under the commiſſion for the remainder. In *Vanderzee* v. *Willis* (*e*) there was an aſſignment of bonds to ſecure 1,000*l.* borrowed by the teſtator from his bankers. At that time he was indebted to them in more; and he continued indebted in more to his death. His executrix filed a bill to redeem. The bankers inſiſted upon the right to tack; and ſo ſtanding the caſe, it would, I think, have been held, that they muſt be paid the whole: but it was inſiſted, that a bill had been filed by creditors, and a decree made. Lord *Thurlow* ſeems to have held, that

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(*a*) 1 *Veſ.* 86.

(*b*) The name of that caſe is *Jackſon* v. *Langford*, *July* 21. 1755, *Reg. Lib. A.* 1754.

(*c*) 3 *Atk.* 630.

(*d*) *Pre. Ch.* 419. 2 *Vern.* 691. See *Jones* v. *Smith*, *ante*, vol. 2. 372. The decree in that caſe was reverſed by the Houſe of Lords.

(*e*) 3 *Bro. C. C.* 21.

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would have made it a queſtion with creditors, not with the executrix ſimply; ſtating the principle; that, where the equity has paſſed to an aſſignee, you cannot inſiſt upon retaining againſt the aſſignee. In this caſe the equity of redemption paſſed by the aſſignment for the benefit of *Wood*'s creditors; and therefore *Claxton* cannot inſiſt on paying himſelf the additional ſum.

The other queſtion ariſes in conſequence of a reference to the Maſter to inquire, to whom a Policy of inſurance upon *Wood*'s life, or the money, that may be received thereon, belongs. The Report ſtates all the circumſtances; and concludes, that the Maſter conceives, the teſtator *Wood* did by that paper writing ſo appropriate the benefit of the Policy, that the perſons intereſted under the will of *Boyfield* have a right to the benefit of the money. No Exception is taken to the Report: but the whole matter appears upon the face of it; and therefore it is contended, that it is open to inquire, whether the Maſter's concluſion is right; and I apprehend, it is ſo open. The date of this paper muſt be falſe; for *Boyfield* was not at that time dead. The Report does not ſtate, whether *Wood* at the time he made this writing was or was not indebted to the perſons, for whoſe benefit he profeſſes to make this ſpecies of appropriation: but it turns out, and appears by the ſchedule to the Report, that the repreſentatives of *Boyfield* were creditors of *Wood* to the extent of 4,000*l.* It is contended, that this was ſuch an appropriation as gives theſe perſons, the repreſentatives of *Boyfield*, a lien againſt the general creditors. It is admitted, this Policy, when firſt made, was entirely *Wood*'s own property. It could not have been procured in truſt for them; for then *Boyfield* was not dead; and they had not become his repreſentatives. Being *Wood*'s own property, how did it ceaſe to be ſo? Has it been transferred? How has any other perſon acquired a lien; ſo as to prevent the effect of any general or ſpecial aſſignment? This paper is quite inſufficient for that purpoſe. I do not very well know, what is meant by an appropriation of the Policy to a debt: how a man, ſitting in his cloſet, could by writing a paper, declaring, that certain bonds, or part of his ſtock, ſhould be applied to a particular debt, appropriate that property. That is not an aſſignment; a lien, giving that creditor a right to a ſpecific application in his favour, to the prejudice of creditors: who might in any other way have obtained a right to

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the general effects. If he had given an order upon a particular fund to a creditor, that would have been an appropriation of ſo much of that fund to the debt; and the creditor would have a right upon that. But in this caſe there was no communication between the creditor and the debtor: there is nothing but a mere piece of paper. It is not even written upon the Policy, but a detached ſlip of paper; which he pins to it; keeping it in his own poſſeſſion; and not even communicating the fact, that he had written it. He might have deſtroyed, or detached, it. He keeps it ſome years; and at laſt delivers it up to the truſtees, to whom he had aſſigned the whole of his effects for the benefit of his creditors. But there is no ſtatement upon the paper, that it is in ſatisfaction of any debt; or, that he owes any debt. The words, as far as they relate to the Policy are purely words of gift. Perhaps they might have operated as legatory words; as a bequeſt after his death. There is no mention, that it is in ſatisfaction of any debt, or that any debt was due. I only collect from another part of the paper, that there was ſtock, ſtanding in his name, purchaſed with the aſſets of *Boyfield:* but that goes only to that ſtock. I do not collect, that any ſatisfaction of that debt was intended. It is ſaid, that though this is an undelivered inſtrument, a kind of contract with himſelf, and in his own power, yet it was all he could do, all the delivery, that could take place; for he had embezzled part of the aſſets; and this was meant as a ſatisfaction for that embezzlement: but it is not true, that this was all he could have done. He might have aſſigned it immediately to a truſtee upon the truſts of *Boyfield*'s will; and he profeſſes to intend to do that. This does not purport to be a final inſtrument. But it reſts as mere declaration of intention; which can in my apprehenſion produce no effect whatſoever.

Therefore upon this queſtion the Maſter has drawn a wrong concluſion; and this Policy muſt be conſidered as conſtituting part of the general effects for the benefit of the creditors. Upon the only remaining queſtion declare, that the defendant *Claxton* is not to be charged with the money depoſited in *Nightingale*'s bank.

Rolls.
July 2. 6.

MOORE *v.* FOLEY.

Conſtruction of a covenant for renewal under the like covenants, *&c.*; that it was not for perpetual renewal: the Courts leaning againſt that conſtruction, unleſs clearly intended.

See Iggulden v. May 9. Ves. Jun. 325.

By indentures of leaſe, dated the 12th of *November* 1759, Lord *Foley* granted certain premiſes to *Robert Moore*, his executors, adminiſtrators, and aſſigns, for the lives of his three children, *Robert*, *James*, and *Mary*, *Moore*, and of the longeſt liver of them; in truſt for them ſucceſſively, at the yearly rent of 60*l.* 3*s.* 4*d.*; and alſo paying at the deceaſe of every of them, the ſaid *Robert*, *James*, and *Mary*, 40*l.* as a heriot.

The leaſe contained a covenant, that, when any one of them, the ſaid *Robert*, *James*, and *Mary*, *Moore*, ſhould happen to die, then the ſurvivors of them, the ſaid *Robert*, *James*, and *Mary*, *Moore*, their heirs and aſſigns, ſhould within one year next after the death of ſuch one of *Robert*, *James*, and *Mary*, *Moore*, as ſhould firſt happen to die, pay to Lord *Foley*, his heirs or aſſigns, the ſum of 42 *l.* 6 *s.*; and that Lord *Foley* ſhould upon receipt of that ſum and requeſt and ſurrendering the ſaid grant at the coſt of *Robert Moore*, the elder, his heirs or aſſigns, grant unto the ſurvivors of them, the ſaid *Robert*, *James*, and *Mary*, *Moore*, and to ſuch other perſon as the ſaid ſurvivors ſhould nominate, the premiſes; to hold to the ſurvivors of them, the ſaid *Robert*, *James*, and *Mary*, *Moore*, and ſuch other perſon as the ſaid ſurvivors ſhould nominate, for and during the natural lives of ſuch two of them, the ſaid *Robert*, *James*, and *Mary*, *Moore*, as ſhould happen to ſurvive, and for the life of ſuch third perſon as the ſaid ſurvivors of them, the ſaid *Robert*, *James*, and *Mary*, *Moore*, ſhould nominate; and for the life of the longeſt liver of them, for their natural and reſpective lives ſucceſſively, and not jointly, at, for, and under the like rent, covenants and conditions, as were therein contained and reſerved; and moreover it was mutually granted and agreed, that in ſuch grant to be made by Lord *Foley*, his heirs or aſſigns, unto *Robert Moore*, the elder, his heirs and aſſigns, (in truſt, as aforeſaid) it ſhould be covenanted and agreed, that when and as often as any one of the ſaid three perſons, for whoſe lives the ſaid grant ſhould be made, ſhould happen to die, then the ſurvivors of them ſhould within one year after the death of ſuch one perſon pay to Lord *Foley*, his heirs or aſſigns, the ſum

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ſum of 42 *l.* 6 *s.*; and ſurrender the grant then in being; and Lord *Foley*, his heirs and aſſigns, ſhould upon the payment of the ſaid money and ſurrendering up of ſuch grant at the requeſt and charges of the ſaid ſurvivors of ſuch leſſees execute another grant unto the ſaid ſurvivors of ſuch leſſees for and during the lives of ſuch two of the ſaid perſons as ſhould be then living and for the life of ſuch other perſon as the ſaid ſurvivors of the ſaid leſſees ſhould nominate under the like rent, covenants, proviſoes, and conditions as were therein contained: provided, that, when any two of ſuch perſons, for whoſe lives ſuch grant ſhould happen to be made, ſhould happen to die within one year, and before ſuch new grant ought to be made according to the true meaning of the ſaid leaſe, then the ſurvivor of ſuch leſſees ſhould within one year next after the death of ſuch ſecond perſon of the ſaid three perſons, for whoſe lives ſuch grant ſhould be made, pay to Lord *Foley*, his heirs or aſſigns, the ſum of 102 *l.* 6 *s.*; and that Lord *Foley*, his heirs or aſſigns, ſhould upon receipt of the ſaid money and ſurrendering up of the grant then in being at the requeſt and charges of ſuch ſurviving leſſee execute another grant unto ſuch ſurviving leſſee for the lives of ſuch ſurviving leſſee and of ſuch two other perſons as ſuch ſurviving leſſee ſhould nominate, at, for, and under, the like rents, covenants, and conditions, as were therein mentioned and contained: Provided, that, if at any time *Robert Moore*, the elder, his heirs or aſſigns, ſhould upon the death of any one or more of them, the ſaid *Robert*, *James*, and *Mary*, *Moore* neglect or refuſe to pay to Lord *Foley*, his heirs or aſſigns, the ſaid reſpective ſums, or to ſurrender the grant then in being, and accept a new grant, it might be lawful for Lord *Foley*, his heirs and aſſigns, to enter, and hold, until he and they ſhould have received the ſaid ſeveral and reſpective ſums with intereſt; and then he and they ſhould make ſuch grants, *&c.* as he and they ought to have made, if the money had been paid at the time: Provided, that, if the heir of Lord *Foley* ſhould be within age at the time, when the new grant ſhould be made, no entry ſhould take place till a month after he ſhould have attained his age.

Lord *Foley* died in 1766. *Robert Moore*, the younger, one of the lives, died upon the 7th of *July* 1793. Upon his deceaſe *James Moore* applied for a renewal according to the covenants to

Andrew Foley, deviſee in truſt of the laſt *Thomas*, Lord *Foley*. No renewal could then be made: the preſent Lord *Foley* being under twenty-one: but an act of Parliament was paſſed enabling *Andrew Foley* to grant and renew leaſes. In *April* 1796, before any renewal *Mary Moore*, another of the lives, died. Upon her death *James Moore* applied to have two new lives added; offering to pay two fines of 42 *l.* 6 *s.* each. The parties differing as to the proper covenant to be inſerted in the new leaſe, the bill was filed by *James Moore;* and a decree was made; referring it to the Maſter to ſettle a leaſe.

An Exception was taken by the defendant to the Maſter's Report, approving a leaſe containing a covenant for perpetual renewal: *viz.*

When and as often as any one of the ſaid three perſons, for whoſe lives the ſaid grant ſhall be made, ſhall die, Lord *Foley*, his heirs or aſſigns, ſhall within one year upon payment of 42 *l.* 6 *s.* and ſurrender of the grant then in being execute another grant to *James Moore*, his heirs or aſſigns, for the lives of the two ſurvivors and ſuch other perſon as *James Moore*, his heirs or aſſigns, ſhall nominate, under the like rents, covenants, proviſoes, and conditions, as are herein contained; and in caſe two ſuch perſons die within one year, before ſuch grant, then within one year after the death of the ſecond of the three perſons, for whoſe lives the ſaid grant ſhall be made, Lord *Foley*, *&c.* ſhall on payment of 102 *l.* 6 *s.* and ſurrender, execute a new grant for the lives of the ſurvivor and ſuch two other perſons, as ſhould be nominated, at, for, and under, the like rents, covenants and conditions, *&c.*

Mr. Lloyd and Mr. Lewis in ſupport of the Exception inſiſted, the rule is now eſtabliſhed, that a general covenant for renewal, ſubject to the like covenants, *&c.* is excluſive of the general covenant for renewal; and the Court will not without the ſtrongeſt words inſert ſo unreaſonable a covenant. They relied on *Tritton* v. *Foote* (*a*) and the note there, *Ruſſel* v. *Darwin* (*b*).

(*a*) 2 *Bro. C. C.* 636.

(*b*) 2 *Bro. C. C.* 639. *n.*

Mr. Richards and Mr. Cooke for the Report—Theſe caſes do not apply to this. The general principle until the deciſion of *Tritton* v. *Foote* and the caſe before Lord *Camden* was to make theſe leaſes perpetually renewable. But there are two covenants in this grant; which diſtinguiſh this caſe. The ſecond covenant puts it out of all doubt. The covenant now propoſed is the very covenant, for which they have ſtipulated. This leaſe has been always conſidered as perpetually renewable from the very firſt grant; which was in 1662; and ſeveral inſtances have been found.

Mr. Lloyd in reply—The practice is not material: this conſtruction upon theſe covenants being very modern. Upon what ground were theſe caſes determined, except this; that ſuch a covenant is unreaſonable. The covenant for renewal was included under the general words in thoſe caſes. It is very difficult to collect the intention from theſe words; and the Court will require the cleareſt intention for this purpoſe; which is in effect giving away the eſtate.

July 6.

The Maſter of the Rolls—In the firſt part of this leaſe nothing is ſtated but the premiſes, the lives, for which they are granted, and the rent payable. If it reſted there, the leaſe would be at an end, when thoſe lives dropped. Then comes the firſt proviſion for renewal. If it reſted upon that, it would be a covenant for renewal upon the dropping of the firſt life only; and the moment they had got a new life in the place of that one that covenant would have been completely ſatisfied; unleſs they could inſiſt, that the words "under the like rent, covenants and conditions," were meant to include that covenant for renewal; and that in the ſecond leaſe a farther covenant for renewal ſhould be inſerted. But it does not ſtop there. They go on to make this ſtipulation with regard to the covenant to be inſerted in that new leaſe, to ſupply the firſt life, that ſhould drop; that "in ſuch grant," (that is the grant to fill up a new life in the room of that firſt dropping) it ſhould be covenanted and agreed, that when and as often as any one of the ſaid three perſons, for whoſe lives the ſaid grant ſhould be made, ſhould happen to die, another grant ſhould be made for the lives of the ſurvivors and ſuch other perſon as ſhould be nominated, under the like rent, covenants, proviſoes and conditions, as were therein contained. The mode adopted is not by providing directly, how long theſe renewals ſhould go on, but by a covenant with regard to the renewal, to be introduced into the ſecond leaſe. Then follows the proviſion for the caſe of two of them dying within a year.

This is all, that relates to the farther renewal. The firſt agreement is, that this ſtipulation ſhall be inſerted in ſuch grant; that is, the grant, that was to be made upon the dropping of the firſt life; and conſequently the introduction of this ſtipulation into that would have the effect of entitling the leſſee to a renewal upon the death of every one of the three perſons compriſed in the ſecond grant. I lay out of conſideration the firſt leaſe. The ſecond will become in the nature of an original leaſe; when there is a grant for three lives, with this ſtipulation to be introduced into it; that when any one of the three dies, a new leaſe ſhall be granted for the lives of the ſurvivors and a new life. Does that carry it further than the lives of the three perſons; whoſe names ſhall be contained in that ſecond grant? I am of opinion it does not. There is no ſtipulation for any ulterior event; and there are no general words. The words are not "from time to time" as in *Furnival* v. *Crew* (*a*); upon which words Lord *Hardwicke* laid great ſtreſs; as amounting to an obligation to fill up lives upon the dropping at any time: but this covenant extends no farther than to introduce this very ſtipulation into this one new grant; and as to the lives only, to be contained in that grant. But the plaintiff wants, not to have it introduced into this firſt grant, after the original one, but to have a ſtipulation for the ſame proviſo in the ſubſequent grant; and if it is neceſſary to introduce it in the next, it muſt be *in infinitum*, upon this principle; that I can find out in the firſt a clear intention for a perpetual renewal. Otherwiſe I cannot carry it farther than the dropping of the three lives introduced into the ſecond grant. So the plaintiff upon the whole would have the benefit of four renewals: one under the covenant in the original grant: then having got his three lives again he has that ſtipulation, when any of them die. There are no general words of any kind. They ſtop ſhort at that clauſe.

(*a*) 3 *Atk.* 83.

The covenant is ſpecific, to introduce it into ſuch grant only. It is identiſied and aſcertained by what is ſtipulated immediately before, that it is the grant upon the dropping of the firſt life; and farther, that it extends to the three lives to be filled up, and no others. There is not a word expreſſing, that it was the intention of the parties, that it ſhould be renewable for ever. I am perfectly at a loſs to diſcover a ground for that intention; as they have expreſſed it. Poſſibly their intention was for a perpetual renewal: but it is not expreſſed: nor are there any general words; from which ſuch intention can be collected.

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I agree with the late Maſter of the Rolls in *Baynham* v. *Guy's Hoſpital* (*a*); who ſays (*b*), "I collect therefore from theſe caſes this; that the Courts, in *England* at leaſt, lean againſt conſtruing a covenant to be for a perpetual renewal; unleſs it is perfectly clear, that the covenant does mean it. *Furnival* v. *Crew*, 3 *Atk.* 83. which is relied on in *Cooke* v. *Booth* (*c*), had clear words for a perpetual renewal; which made it impoſſible to conſtrue it otherwiſe."

There being no clear words in this caſe, nor any words relative to perpetual renewal, but the parties themſelves having limited it, the queſtion is, whether the proviſo, that the renewal ſhall be under the ſame rents, covenants, and conditions, as the firſt leaſe ſhall in the abſence of more poſitive ſtipulation amount to a perpetual renewal. Upon *Tritton* v. *Foote* and *Ruſſell* v. *Darwin* I am bound to hold, that a covenant for renewal under the ſame covenants does not include the covenant to renew, but that it means only a ſecond leaſe, not a perpetuity of leaſes. As to *Cooke* v. *Booth*, that was not determined upon the ground, that a covenant for renewal did operate incluſively of that covenant: but Lord *Mansfield* goes almoſt entirely upon the conduct of the parties: repeated renewals having been made. With regard to that mode of conſtruing an inſtrument I refer to *Baynham* v. *Guy's Hoſpital*; where the Maſter of the Rolls ſtrongly proteſts againſt it. I cannot hold, that it is perfectly clear, this covenant means a perpetual renewal: on the contrary the parties, if they meant to reſt upon any thing as a covenant for perpetual renewal, muſt

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(*a*) *Ante*, vol. 3. 295.

(*b*) *Ante*, vol. 3. 298.

(*c*) *Cowp.* 819.

have reſted upon the words "under the like rents, covenants, "and conditions;" and probably they did; for the original leaſe was in 1759; at which period theſe determinations had not taken place; and it might have occurred to thoſe, who prepared the leaſe, that it would be ſufficient. For the reaſons I have given, even if the acts of the parties, which are ſaid to have been upon this foundation of a perpetual renewal, were in evidence before me, I ſhould not act upon them; for certainly that is not a very legal mode of conſtruction; that a man having done an act without being bound to do it, or from miſtake, ſhall therefore be bound for ever without the power of retracting.

Legal inſtruments not to be conſtrued by the acts of the parties.

I think, this plaintiff is entitled to word one of his covenants a little differently from what he would, if he had not conceived he had this right. He is entitled to have a renewal as often as any of the lives drop; not merely the firſt. He is entitled to have the two new lives put in, and to have a renewal upon every one of them; not merely upon the firſt; as he has now ſhaped his covenant.

Exception allowed.

July 4.

Ex parte GREGG.

Upon a ſecond bankruptcy no allowance to the bankrupt: the eſtate not paying 15*s.* in the pound.

THE petitioner became a bankrupt in 1793; and a dividend of 10*s.* in the pound was paid under the Commiſſion. In 1799 he again became a bankrupt; and in *December* 1800 a dividend of 10*s.* in the pound was paid under that Commiſſion; and in *March* following at a meeting for the purpoſe of making a final dividend the effects in hand appeared to be ſufficient for a farther dividend of 2*s.* 6*d.*; upon which the petitioner claimed an allowance of 7*l.* 10*s.* *per Cent.* (*a*). The aſſignee oppoſing the claim, and contending, that, as the petitioner had before been a bankrupt, the Certificate under the ſecond Commiſſion protected only his perſon; but the allowance was the property of the creditors under the ſecond Commiſſion, the Petition was preſented;

(*a*) Stat. 5 *Geo.* 2. *c.* 30. *ſ.* 7.

praying an order for the allowance and the coſts of the Petition out of the eſtate.

In oppoſition to the Petition an affidavit was made, that the deficiency in the bankrupt's accounts did not appear to ariſe from bad debts or loſſes: but the deponent believes, it aroſe from extravagance; and that his effects will not be ſufficient to pay more than 13*s.* 6*d.* in the pound.

Mr. *Pemberton* in ſupport of the Petition.

The petition was diſmiſſed.

HANSON *v.* GRAHAM.

Rolls.
July 2. 8.

JAMES GRAHAM by his will, dated the 18th of *March* 1771, gave to *Mary Hanſon*, *Thomas Hanſon*, and *Rebecca Graham Hanſon*, the three children of his daughter *Mary Hanſon*, 500 *l.* a piece of 4 *per Cent.* Conſolidated Bank Annuities, when they ſhould reſpectively attain their ages of twenty-one years or day or days of marriage, which ſhould firſt happen, provided, it was with ſuch conſent of his executors and truſtees, as therein mentioned; and he declared, his mind and will was, that the intereſt of ſaid ſeveral 500 *l.* amounting in the whole to 1,500 *l.* 4 *per Cent.* Conſolidated Bank Annuities, ſo given to his three grandchildren, as aforeſaid, as often as the ſame ſhould become due and payable, ſhould be laid out at the diſcretion of his executors and truſtees in ſuch manner as they or the ſurvivor of them ſhould think proper for the benefit of his ſaid grandchildren, till they ſhould attain their reſpective ages of twenty-one years or day or days of marriage, and to and for no other uſe, intent, or purpoſe, whatſoever; and after deviſing his real and leaſehold eſtates, and giving two legacies of 10 *l.* each, he gave all the reſidue of his perſonal eſtate to his ſon *Iſaac Graham*; and appointed him ſole executor.

The word "when" in a will, alone and unqualified, is conditional: but it may be controlled by expreſſions and circumſtances: ſo as to poſtpone payment or poſſeſſion only, and not the veſting: as, where the intereſt of the legacy in the interval was directed to be laid out at the diſcretion of the executors for the benefit of the legatees, it veſted immediately.

See a reference to this determination of Sir Wm Grant in deciding Branstrom v. Wilkinson 6. Ves. Jun. 421. which latter case was also before him.

The teſtator died ſoon after the execution of his will. Afterwards, in 1774 *Rebecca Graham Hanſon* died inteſtate at the age of nine years; leaving her mother and her brother *Thomas Hanſon* and her ſiſter *Mary Coates* ſurviving. The mother died; and bequeathed all her perſonal eſtate to her ſon *Thomas Hanſon*; and appointed him executor.

The bill was filed by *Thomas Hanſon* and *Mary Coates* againſt *Iſaac Graham* for an account of what was due in reſpect of *Rebecca Graham Hanſon*'s legacy of 500*l.* &c.

Mr. Richards and Mr. W. Agar for the plaintiffs—The plaintiffs inſiſt, that, though *Rebecca Graham Hanſon* died under the age of twenty-one and unmarried, ſhe took a veſted intereſt in this legacy. Upon the firſt part of the bequeſt there would be a veſted intereſt immediately on attaining the age of twenty-one or marriage: the word "when" not making a condition precedent, but only poſtponing the payment; according to a great number of caſes: the laſt are *Doe* v. *Lea* (*a*) *May* v. *Wood* (*b*), and *Booth* v. *Booth* (*c*); in which all the others are noticed. *Booth* v. *Booth* was the caſe of a reſidue; upon which certainly ſome diſtinctions have been taken; and Lord *Alvanley* in that caſe acknowledges, that there is ſome diſtinction, notwithſtanding what he ſays with reference to *Love* v. *L'Eſtrange* (*d*) in *May* v. *Wood;* which was the caſe of a particular legacy. In this caſe however the reſt of the will puts the caſe beyond all argument: the intereſt being given to the children; which will raiſe a veſted intereſt; even though the capital ſhould be given in words importing a contingency. *Stapleton* v. *Cheales* (*e*) is the leading caſe upon that point; which was acted upon in a great number of caſes: *Fonereau* v. *Fonereau* (*f*), *Heath* v. *Heath* (*g*), *Walcot* v. *Hall* (*h*), *Lampen* v. *Clowbery* (*i*), or *Clobberie*'s caſe (*k*). In this caſe the time is pointed out on account of the perſon, to whom the legacy is given.

Mr. Romilly and Mr. Martin for the defendant—This queſtion, like all others upon wills, is a mere queſtion of intention. The rules, that have been eſtabliſhed, muſt be admitted: that, for inſtance,

(*a*) 3 *Term Rep. B. R.* 41. (*b*) 3 *Bro. C. C.* 471. (*c*) *Ante*, vol. 4. 399.
(*d*) 3 *Bro. P. C.* 337. (*e*) *Pre. Ch.* 317. 2 *Vern.* 673.
(*f*) 3 *Atk.* 645. 1 *Veſ.* 118. (*g*) 2 *Bro. C. C.* 3. (*h*) 2 *Bro. C. C.* 305.
(*i*) 2 *Ch. Ca.* 155. (*k*) 2 *Ventr.* 342.

inſtance, mentioned in *Stapleton* v. *Cheales*; where the legacy is given at a certain period, and, where the period is pointed out only as the time, when the benefit intended is to come into enjoyment: or, as it is better expreſſed in modern times, where the time is annexed to the ſubſtance of the gift, and where to the payment only. There never was a caſe, in which the time was more clearly annexed to the ſubſtance of the gift; where it has been more clearly expreſſed to be given at the time mentioned, and not merely to be paid at the time. *May* v. *Wood*, and *Booth* v. *Booth* are not in the leaſt applicable: the time being immediately connected with the payment. The Maſter of the Rolls in *May* v. *Wood* profeſſing to lay out of his conſideration the words "equally "to be divided" overturns the whole claſs of caſes. In the ſame caſe the Maſter of the Rolls alſo profeſſed not to diſtinguiſh between a reſidue and a particular legacy: but in *Booth* v. *Booth* that is retracted. No caſe has determined, that the words, "when, "if, at," alone will veſt. Two periods are here mentioned: the age of twenty-one, or marriage with conſent. Suppoſe, any of them had married without conſent: would it have been veſted?

Upon the particular intention in this caſe there can be no doubt. The whole reſidue is given by the teſtator to his ſon. The reaſon for fixing theſe periods in giving the legacies to his grandchildren is, that thoſe were the times, when it would be neceſſary for them to receive their portions or advancements; before which they were not likely to have occaſion for them. If he had foreſeen the event, that one would die at the age of nine years, he could not have intended the mother to take what he gave in the nature of a portion; placing himſelf *in loco parentis*. That circumſtance leads to the concluſion, that he did not intend the legacy to veſt, if the legatee did not live to the time pointed out. In many caſes the Court has gone expreſsly upon that ground; holding, that a portion from a perſon *in loco parentis* would not veſt; though one from a ſtranger would. I admit, a legacy given at the age of twenty-one with intereſt in the mean time will be veſted. The reaſon is, that when the teſtator directs intereſt to be paid out of that legacy in the mean time, he means to ſeparate that legacy from the bulk of the eſtate immediately; though it is not to veſt in actual enjoyment until the future time. A conſiderable diſtinction ariſes upon the circumſtance, that this is a legacy

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legacy of ſtock. The dividends are ſomething actually exiſting; and a diſtribution is neceſſary. They are not like intereſt of a legacy to ariſe at a future time; which would not exiſt unleſs particularly given. The direction therefore, that intereſt is to be paid in the mean time, is ſeparating that from the reſt of the property. The dividends muſt ariſe; whether any diſpoſition is made of them, or not. The early authorities proceed upon technical reaſoning, and not ſo much upon the intention as the ſubſequent caſes. Upon the argument from the gift of the dividends the words of contingency are nugatory. Though, generally ſpeaking, a gift of the intereſt veſts the legacy, a direction for maintenance is not equivalent to a gift of the intereſt: *Pulſford* v. *Hunter* (a). A gift of the dividends for maintenance is not equivalent to a gift of the intereſt; and that is the object here.

Mr. Richards in reply—The judgment of Lord *Alvanley* in *May* v. *Wood* certainly applies to the firſt part of this will; if it ſtood alone. His Lordſhip certainly put out of his conſideration the words "equally to be divided." Without thoſe words this is in the ſame terms, upon an uncertain event. *Booth* v. *Booth*, though a caſe of a reſidue, is applicable. But upon the latter part of the will it is impoſſible to doubt. All the caſes agree, that, generally ſpeaking, a gift of the intereſt veſts the legacy. There may be caſes, I admit, where the intereſt may be ſeparated from the body: but in this will it is given in reſpect of the body of the legacy. There is no diſtinction as to ſtock: that in the one caſe it is ſeparated more than in the other. *Pulſford* v. *Hunter* does not apply. The maintenance may not be equal to the intereſt of the legacy. A part only may be given for maintenance. In this will certainly the intention appears to veſt the intereſt, as it ſhould accrue from time to time. It is not given for maintenance; as it was ſpecifically in *Heath* v. *Heath*. But the intereſt is given; and upon the general rule that draws the ſubſtance with it.

July 8. *The Maſter of the Rolls*—The queſtion is, whether this legacy veſted. It is contended for the plaintiffs, that it did veſt, upon two grounds: 1ſt, they ſay, it would have been veſted; ſuppoſing, there was nothing more than the words, with which the clauſe begins; and that if it reſted upon a legacy, when the legatee ſhould attain the age of twenty-one or marriage, it is now ſettled, that theſe words give a veſted intereſt; and that is eſtabliſhed by *May* v. *Wood;* and undoubtedly a propoſition is there laid down; which would have the effect of making this a veſted legacy; if it is true in the extent there ſtated. The propoſition is there laid down very broadly and generally by the late Maſter of the Rolls; that all the caſes for half a century upon pecuniary legacies have determined the word "when," not as denoting a condition precedent, but as only marking the period, when the party ſhall have the full benefit of the gift; except ſomething appears upon the face of the will to ſhew, that his bounty ſhall not take place, unleſs the time actually arrived.

(a) 4 *Bro. C. C.* 416.

This propoſition is ſtated ſo broadly and generally, that I rather doubt the correctneſs of the Report. Conſidering the well known diligence of the late Maſter of the Rolls in examining caſes, and his uncommon accuracy in ſtating the reſult of them, he would hardly have drawn this concluſion from an examination of the caſes; for no caſe has determined, that the word "when," as referred to a period of life, ſtanding by itſelf, and unqualified by any words or circumſtances, has been ever held to denote merely the time, at which it is to take effect in poſſeſſion; but ſtanding ſo unqualified and uncontrolled it is a word of condition; denoting the time, when the gift is to take effect in ſubſtance. That this is ſo, is evident upon mere general principles; for it is juſt the ſame, ſpeaking of an uncertain event, whether you ſay, "when" or "if" it ſhall happen. Until it happens, that, which is grounded upon it, cannot take place. In the Civil Law the words "*Cum*" and "*Si*," as referred to this ſubject, are preciſely equivalent; and from that law we borrow all, or at leaſt the greateſt part, of our rules upon legacies; and particularly the rule upon the ſubject immediately under conſideration in that caſe, with reference to the words, by which a teſtator denotes his intention as to the gift taking effect, or taking effect in poſſeſſion. In the Digeſt (*a*) it is thus laid down:

In the Civil Law the words "cum" and "ſi," as referred to legacies, are equivalent; and from that law this rule and moſt of our other rules upon legacies are borrowed.

(*a*) *Lib.* 36. *Tit.* 2. *ſ.* 22.

"Si Titio, cum is annorum quatuordecim eſſet factus, legatus "fuerit, et is ante quatuordecimum annum deceſſerit, verum eſt, "ad hæredem ejus legatum non tranſire: quoniam non ſolum "diem, ſed et conditionem hoc legatum in ſe continet; ſi effectus "eſſet annorum quatuordecim. Qui autem in rerum natura non "eſſet, annorum quatuordecim non eſſe non intellegeretur. Nec "intereſt utrum ſcribatur, ſi annorum quatuordecim factus erit, "an ita: cum priore ſcriptura per conditionem tempus demonſtratur; ſequenti per tempus conditio: utrobique tamen eadem "conditio eſt."

It is very true: the word "when," not ſo ſtanding by itſelf, but coupled with other expreſſions or circumſtances, that have a reference to the time, at which the poſſeſſion of the thing is to take place, has been held by the Civil Law not to have ſo abſolute a ſenſe that it cannot poſſibly be controlled. Another paſſage in the Digeſt (*a*) is thus expreſſed:

"*Seius Saturninus* Archigubernus ex claſſe *Britanica* teſtamento "fiduciarium reliquit heredem *Valerium Maximum* trierarchum: "a quo petiit ut filio ſuo *Seio Oceano*, cum ad annos ſedecim pervenifſet, hereditatem reſtitueret. *Seius Oceanus*, antequam impleret annos, defunctus eſt."

Then it ſtates, that a claim was made by the uncle of *Seius*, as next of kin, which was reſiſted by the fiduciary heir, who contended, that, as *Seius* had not lived to the age of ſixteen, it was not veſted. The opinion is this:

"Si *Seius Oceanus*, cui fideicommiſſa hereditas ex teſtamento "*Seii Saturnini*, cum annos ſedecim haberet, a *Valerio Maximo* "fiduciario herede reſtitui debet, priuſquam præfinitum tempus "ætatis impleret, deceſſit: fiduciaria hereditas ad eum pertinet, "ad quem cætera bona *Oceani* pertinuerint: quoniam dies fideicommiſſi vivo *Oceano* ceſſit: ſcilicet ſi prorogando tempus ſolutionis, tutelam magis heredi fiduciario permiſiſſe, quam incertum diem fideicommiſſi conſtituiſſe, videatur."

(*a*) *Dig.* lib. 36. tit. 1. ſ. 46.

This diſtinction was transferred from the Civil Law to ours; at leaſt ſo far clearly as regards pecuniary legacies. In the caſe cited, *Stapleton* v. *Cheales*, it was clearly held, that the expreſſions "at twenty-one," or "if," or "when," he ſhall attain twenty-one, were all one and the ſame; and in each of thoſe caſes if the legatee died before that time, the legacy lapſed. I do not find any caſe, in which this poſition has been ever contradicted. In *Fonnereau* v. *Fonnereau* (*a*) it was clear, if it had ſtood upon the firſt part of that bequeſt, it would have been held not veſted. Lord *Hardwicke* reſts entirely upon the ſubſequent words, as controlling the word "when;" as it would have operated, ſtanding alone. That will ſets out preciſely as this does; but when it went on with words, making the intention clear, giving intereſt for his education, with a power to the truſtees to lay out any part of the principal to put him out apprentice, and the remainder to be paid to him, when he ſhould attain the age of twenty-five, it was clear, upon the whole nothing but the payment was poſtponed.

Diſtinction between a legacy at twenty-one and payable at twenty-one, borrowed from the Civil Law, but diſapproved.

A diſtinction has been introduced between the effect of giving a legacy at twenty-one and a legacy payable at twenty-one. That is alſo borrowed from the Civil Law. The Code (*b*) thus ſtates it:

"Ex his verbis, do lego Æliæ Severinæ filiæ meæ, et Secundæ "decem: quæ legata accipere debebit, cum ad legitimum ſtatum "pervenerit: non conditio fideicommiſſo vel legato inſerta: ſed "petitio in tempus legitimæ ætatis dilata videtur:"

For there the words were, that the time of payment was to be at her legitimate age:

"Et ideo ſi Ælia Severina filia teſtatoris, cui legatum relictum "eſt, die legati cedente, vita functa eſt: ad heredem ſuum actionem "tranſmiſit; ſcilicet ut eo tempore ſolutio fiat, quo Severina, "ſi rebus humanis ſubtracta non fuiſſet, viceſſimum quintum annum "ætatis impleſſet."

This diſtinction however has been held by ſome Equity Judges altogether without foundation; and by others it has been treated

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(*a*) 3 *Atk.* 645. 1 *Veſ.* 118.

(*b*) *Cod.* Lib. 6. Tit. 53. ſ. 5.

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as too refined. Lord Keeper *Wright* in *Yates* v. *Fettiplace* (*a*), alluding to the diſtinction in *Godolphin* and *Swinburne* from the Civil Law, declared it altogether without foundation. Lord *Cooper* acknowledged, that it was at leaſt a refinement: but he thought, it was now well eſtabliſhed. Lord *Hardwicke* likewiſe ſaid, it was originally a refinement (*b*). But in what did that refinement conſiſt? It was not in holding, that it ſhould not veſt before the age of twenty-one, but in holding, that it ſhould veſt, though the party ſhould not attain that age: their opinion being, that it ſhould not veſt. Then why ſhould we refine upon a refinement by deviating ſtill more, and holding arbitrarily, that the word "when" ſtanding by itſelf it does not import condition; I ſay, that ſtanding by itſelf does not import condition; and it requires other words to ſhew, it was meant to defer payment. But according to the Report of the judgment in *May* v. *Wood* it is quite the reverſe; that ſtanding alone it imports delay of payment; and other words are neceſſary to ſhew a condition. That is a diſtinction upon a diſtinction; which original diſtinction has by ſeveral great Judges been held to have been originally a refinement. The only caſes alluded to in *May* v. *Wood* are caſes of real eſtate; beginning with *Boraſton*'s caſe (*c*); and ending with *Doe* v. *Lea*. The principle of them all is ſtated by Lord *Mansfield* in *Goodtitle* v. *Whitby* (*d*) in a way, that renders them perfectly conſiſtent with the opinion I entertain as to the word "when," ſtanding by itſelf, unqualified and uncontrolled. Lord *Mansfield* there lays down theſe rules of conſtruction:

"1ſt, Wherever the whole property is deviſed, with a particu-
"lar intereſt given out of it, it operates by way of exception out
"of the abſolute property:"

"2dly, Where an abſolute property is given, and a particular
"intereſt in the mean time, as until the deviſee ſhall come of age,
"*&c.* and when he ſhall come of age, *&c.* then to him, *&c.* the
"rule is, that that ſhall not operate as a condition precedent, but
"as a deſcription of the time, when the remainder man is to take
"in poſſeſſion."

(*a*) *Pre. Ch.* 140. 2 *Vern.* 416.

(*b*) See *Mackell* v. *Winter*, *ante*, vol. 3. 536. *Bolger* v. *Mackell*, *ante*, vol. 5. 509.

(*c*) 3 *Co.* 16.

(*d*) 1 *Bur.* 228.

There could be no doubt of the intention there. Every thing was given to the truſtees for the benefit of the infant. He was entitled ultimately to have the whole. The reaſon of giving to the truſtees in the mean time evidently was, that he was not intended to have the poſſeſſion and management until the age of twenty-one.

Upon exactly the ſame ground was *Boraſton*'s caſe. It was not alleged in that caſe, that theſe were not words of contingency, taken by themſelves: but it was ſaid, you muſt model theſe unapt words; ſo as to get at the intention from the whole will. The evident intention was to defer payment for a particular purpoſe; as if he had calculated, how many years it would take to pay off his debts, and in how many years *Hugh Boraſton* would attain the age of twenty-one; and if given to the executors, with remainder to him at twenty-one, it would be clear veſted remainder. The Court approves that argument of the Counſel; but does not ſay, that "when," ſtanding by itſelf, would not have made a condition. So, in *Manſfield* v. *Dugard* (*a*) it was clear, the teſtator meant to poſtpone the enjoyment of the ſon for the ſake of the antecedent benefit of the wife: but he clearly meant a veſted remainder, not contingent, whether the ſon ſhould take any benefit at all in the eſtate. But that makes a very different queſtion from this; whether, where there is no precedent eſtate, no purpoſe whatſoever, for which the enjoyment was to be poſtponed, you ſhall ſay, the enjoyment only is to be poſtponed. So in *Doe* v. *Lea* the deviſee was intended to have the whole benefit: but truſtees were interpoſed, to keep the management of the eſtate, until he ſhould attain the age of twenty-four; with a charge out of the rents and profits to keep the buildings in repair. There was a reaſon for poſtponing the poſſeſſion; and it was evident, nothing but the enjoyment was intended to be poſtponed. It was not a bare deviſe to him, when he ſhould attain twenty-four.

If thoſe caſes therefore had occurred as to pecuniary legacies, there is no ground to ſay, the deciſion ought to have been different; for from the very ſame circumſtances and expreſſions it might be collected, that the word "when" was uſed, not as a condition, but merely to poſtpone the enjoyment: the poſſeſſion in

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(*a*) 1 *Eq. Ca. Ab.* 195.

in the mean time being diſpoſed of in another way. It is impoſſible, that Lord *Mansfield*, and there is nothing in his judgment indicating it, could have conſidered the word "when," ſtanding by itſelf, as other than a word of condition. It is impoſſible; for only two days before, in *Goſs* v. *Nelſon* (*a*) having occaſion to ſpeak of legacies, upon a note of hand, which he compared to the caſe of a legacy, he ſays, "but if the time is annexed to the ſubſtance of the gift, as a legacy, if, or when, he "ſhall attain twenty-one, it will not veſt, before that contingency "happens." He conſidered "when" preciſely the ſame as "if."

Love v. *L'Eſtrange* (*b*) ſeems to have been conſidered a ſtrong authority for holding "when" to operate conditionally. The late Lord Chancellor was ſo ſtrongly impreſſed with the idea he had thrown out at an early period in *Monkhouſe* v. *Holme* (*c*), that he found it difficult to account for it otherwiſe than upon the diſtinction as to a reſidue; which the late Maſter of the Rolls in *Booth* v. *Booth* acknowledged there might be. But it was not neceſſary to reſort to that; for *Love* v. *L'Eſtrange* may be warranted upon the principles laid down in *Goodtitle* v. *Whitby*. It was not a ſimple, unqualified, gift: but there were many circumſtances to ſhew, that *Walter Naſh* was meant to have the benefit abſolutely; and that the enjoyment only was poſtponed: the teſtator giving it to truſtees in the mean time; and applying a reaſon for withholding the enjoyment from this minor; that he wiſhed him to follow his trade as a journeyman; with which object he naturally thought that fortune would interfere; and therefore he poſtpones the enjoyment of it until the age of twenty-four. But he gives it to truſtees entirely and abſolutely for the benefit of *Walter Naſh*; to improve it for his benefit; to transfer the whole to him, when he arrives at that age; and to make him a certain allowance in the mean time. That is very different from a ſimple bequeſt to him, when twenty-four; for if that had been a legacy, it would have been ſeparated from the reſidue immediately upon the teſtator's death; and muſt have been paid over to the truſtees immediately; and they would have managed it, until the legatee had attained the age of twenty-four.

(*a*) 1 *Bur.* 226.

(*b*) 3 *Bro. P. C* 337.

(*c*) 1 *Bro. C. C.* 298.

Upon the whole view of the caſes, and taking the reaſon of the doctrine and the origin of it into conſideration, there is no ground whatſoever for the generality of the propoſition, which the Maſter of the Rolls is repreſented to have laid down in *May* v. *Wood.* To that propoſition the following words are added:

"And not, where he has merely uſed the word "when" for "the ſole purpoſe of poſtponing the time of payment."

If the Maſter of the Rolls meant ſo to qualify his former propoſition, that I admit; and have no difficulty in agreeing to it. But it is evident, that this is inaccurately taken; for the two parts of the propoſition do not accord. Firſt, it is laid down generally, "that it requires words to ſhew, "when" does operate conditionally: in the latter part it is ſtated, that if it appears, "when" is uſed only for poſtponing payment, it ſhall not operate farther. Nothing can be clearer than that.

In this cauſe therefore I ſhould have determined againſt the plaintiffs; if it ſtood merely upon the firſt words. But then it is contended, that they are entitled; becauſe intereſt is given; and that they come within an eſtabliſhed rule of the Court; that though ſuch words are uſed as would not have veſted the legacy, yet the circumſtance of giving intereſt is an indication of intention, explanatory; and denoting, that the teſtator meant the whole legacy to belong to the legatee. On the other ſide it was contended, that the intereſt is not ſo given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the ſame effect as giving intereſt; upon this principle; that nothing more than a maintenance can be called for: what can be ſhewn to be neceſſary for maintenance: however large the intereſt may be; and therefore what is not taken out of the fund for maintenance muſt follow the fate of the principal; whatever that may be. But by this will it is clear, the whole intereſt is given. Can there be any doubt, that in this caſe all the intereſt became, as it fell due, the abſolute property of theſe infants, as ſeparated altogether from the reſidue? All, that is left to the truſtees, is to determine, in what manner it may be beſt employed. It is not merely ſo much of the intereſt as ſhall be neceſſary for the maintenance, but the intereſt entirely,

A direction for maintenance has not the ſame effect in favour of veſting as giving intereſt.

ſeparated from the principal. It is therefore the ſimple caſe of intereſt. It was obſerved for the defendants, that here is not only the period of the age, but alſo marriage with conſent; and it was aſked, ſuppoſing, any of them had married without the conſent of the executors, was it to veſt? That is juſt the ſame queſtion. If it is ſhifted to the queſtion, whether it is to be paid, if any of them married without conſent, the executors might ſay, no: the period of payment had not arrived. But marriage with conſent is not a condition precedent; for at the age of twenty-one, whether married with conſent or not, they would be entitled. That therefore, not operating as a condition precedent, does not make any material diſtinction. The legacy is accompanied with an abſolute gift of the intereſt; which according to the eſtabliſhed rule has the effect of veſting it. I am therefore of opinion, that the plaintiffs are entitled.

June 23.

RONNDELL v. CURRER.

Order for a transfer and payment out of Court; though the cauſe was abated by the death of the plaintiff: the right being clear.

THE late plaintiff, deviſee for life of real eſtates and eſtates directed to be purchaſed with the reſidue of the perſonal eſtate, with remainder in ſtrict ſettlement to his firſt and other ſons in tail, remainder over, died in *February* 1801, unmarried and without iſſue, having attained the age of twenty-one.

By a decree pronounced on the 27th of *May* 1786 the will was eſtabliſhed; and the plaintiff's right, as tenant for life, declared; and directions were given for laying out the reſidue in ſtock, to the account of the perſonal eſtate; and the reſidue of the rents and profits, intereſt and dividends, was directed to be paid into the Bank and laid out: the intereſt, rents, *&c.* to be placed to the ſeparate account of the infant plaintiff; with liberty to him to apply at the age of twenty-one, that the Bank annuities purchaſed for his benefit and the caſh placed to his account may be transferred and paid to him. Several orders were made for laying out the reſidue accordingly.

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A petition, preſented by the defendant, the father and adminiſtrator of the late plaintiff, prayed, that the Accountant General may transfer and pay to the petitioner ſeveral funds and caſh ſtanding in his name in truſt in the cauſe to the ſeparate account of the late plaintiff.

Mr. *Wooddeſon* in ſupport of the petition ſtated, that the object was to obtain this money out of Court; the right being clear, and theſe funds detached from the reſt of the cauſe. The cauſe had abated by the death of the plaintiff; and the defendant could not revive; being a neceſſary defendant, as the only ſurviving executor and truſtee under the will.

Lord CHANCELLOR aſked, if he could make an order in a cauſe, that had abated.

Mr. *Lloyd* (*Amicus Curiæ*) ſaid, it might be done in the caſe of an abatement by the death of one defendant; not, if there was an entire abatement by the death of the plaintiff.

Mr. *Holliſt* (*Amicus Curiæ*) ſaid, where the right was clear by former Orders and Reports, and the application was only to get the money out of Court upon the clear right, ſo eſtabliſhed, the Court would make the order without regarding the abatement.

Lord CHANCELLOR ſaid, he would think of it; and afterwards made the Order according to the Petition.

LORD DURSLEY *v.* FITZHARDINGE.

July 7. 9.

Bill to perpetuate teſtimony of the legitimacy of the plaintiffs, entitled in remainder in tail after an eſtate for life: Demurrer by the 7th and 8th in remainder after the plaintiffs and the other defendants, all infants, overruled: any intereſt, however ſlight, being ſufficient.

THE bill, filed by four infant ſons of Earl *Berkeley* againſt his two other infant ſons and againſt Admiral *Berkeley* and his infant ſon, ſtated, that Earl *Berkeley* under the will of Lord *Berkeley* of *Stratton*, is ſeiſed for life of eſtates in the county of *Dorſet*; with remainders to his firſt and other ſons in tail male; remainder

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to Admiral *Berkeley* for life, and to his firſt and other ſons in tail male; remainder to the teſtator's right heirs. Earl *Berkeley* has ſix ſons living; viz. the four infant plaintiffs and two infant defendants: the eldeſt, Lord *Durſley*, born in 1786; the ſecond in 1788; the third in 1789; the fourth in 1795; the fifth in *October* 1796; and the ſixth in *February* 1800.

The bill proceeded to ſtate pretences, that the plaintiffs are not the lawful iſſue of the Earl and Counteſs of *Berkeley*; alleging, that they were not lawfully married until the 16th of *May* 1796, after the birth of the plaintiffs; when the Earl was married to the Counteſs at *Lambeth* church by her maiden name of *Mary Cole*, ſpinſter; and charged, that they were married on the 30th of *March* 1785 at the pariſh church of *Berkeley* in the County of *Glouceſter* by banns; which were publiſhed, and the ceremony performed, by the Reverend *Auguſtus Thomas Hupſman*, deceaſed; who was curate of that pariſh at the time of the publication of banns, and vicar of the pariſh at the time of the marriage. The ſecond marriage was ſolemniſed only as an act of caution and prudence in reſpect to any children, that might be afterwards born: the firſt marriage having been a conſiderable time concealed at the requeſt of the Earl; and there being great reaſon at the time the ſaid marriage was made public, and the ſecond marriage had, to apprehend, that the regiſtry of the firſt marriage had been loſt, and that a difficulty might occur in proving ſuch marriage ſatisfactorily; particularly, as *Hupſman* was dead, and the perſon, who officiated as clerk at the ceremony, and who was one of the ſubſcribing witneſſes to the marriage, was alſo dead, or not to be found; but which regiſtry and the entry of the publication of banns have lately been found; and as evidence the plaintiffs charge, that the Earl being deſirous, that marriage ſhould be kept ſecret for ſome time, conſulted *Hupſman* as to the beſt manner of celebrating it ſo as that it ſhould not be known to his friends. *Hupſman* recommended him to be married at the pariſh church of *Berkeley* by banns; which were accordingly publiſhed, and the marriage had, in the preſence of *William Tudor* and *Richard Browne*; and the entry was duly made of the publication and the due regiſtry of the marriage, ſigned by the parties and the witneſſes. The bill farther charged, that *Hupſman* ſeveral times afterwards and prior to the birth of the plaintiff Lord *Durſley*, informed

formed ſeveral perſons of the marriage; and many perſons in the neighbourhood believed it; and the Counteſs herſelf ſoon afterwards mentioned it to the Earl in the preſence of others; and he did not contradict her. The prayer of the bill was, that the teſtimony might be perpetuated.

To this bill the defendants Admiral *Berkeley* and his ſon put in a demurrer; ſtating, that the plaintiffs have not by their bill made a caſe to entitle them to have their witneſſes examined, and their teſtimony perpetuated againſt the defendants; that it appears by the bill, that the two other defendants are the natural and lawful ſons, born in lawful wedlock; and that they are tenants in tail male; and the limitations to Admiral *Berkeley* and his firſt and other ſons in tail male are poſterior to the eſtates in tail male given to the other defendants; and therefore theſe defendants are not neceſſary parties to the bill, nor ought to have been made defendants; and the putting them to anſwer the bill and to be parties to the examination of the witneſſes tends to create expence upon the part of the defendants.

The other defendants waited the reſult of this demurrer.

Mr. Richards and Mr. Holliſt for the demurrer—There are now parties upon the record, who are tenants in tail in remainder anterior to any intereſt in Admiral *Berkeley* and his ſon. How the plaintiffs can ſuſtain the bill againſt thoſe parties is not now the queſtion: but theſe defendants, who have demurred, are not bound to anſwer: nor are the plaintiffs entitled to perpetuate teſtimony againſt them. The habit of this Court is not to bring before it in any diſcuſſion as to real eſtate any perſon ſtanding in intereſt behind a clear tenant in tail. In ſelling an eſtate for the payment of debts the familiar practice is not to call upon any perſon as a defendant, who is poſterior to an actual tenant in tail in exiſtence; upon the principle, that formerly the tenant in tail had to a certain extent and in certain caſes the abſolute intereſt in him; and now has ſuch an intereſt as this Court conſiders capable of being made abſolute. He is always treated as having the whole and complete intereſt; and though he is only an infant, whoſe acts will not bind him, and this Court does not require, that the infant ſhould have a Privy Seal for the purpoſe of ſuffering a Recovery, yet it will act upon the eſtate of the infant tenant in tail, as if he was an adult tenant in fee; directing a ſale, &c. This ſort of caſe cannot be diſtinguiſhed from that of a bill for payment of debts and other familiar caſes; but muſt be governed by the ſame principle. In the one caſe as well as the other all the intereſt is before the Court; when the tenant in tail is before the Court. Suppoſe, Lord *Berkeley* was tenant for life, with remainder to his eldeſt ſon in fee; and the bill was filed by the eldeſt ſon againſt Admiral *Berkeley*; who, if the eldeſt ſon was not legitimate, would be the heir: the bill could not be maintained; for clearly the defendant would have no intereſt: the law not conſidering ſuch a poſſibility. There is no caſe upon this point; though there are ſome bearing an analogy to it. In *Mitford* (*a*) caſes are put, in which the plaintiffs had no certain intereſt. In this inſtance the defendants in the contemplation of the Court have only an expectancy and poſſibility; which the Court will not acknowledge. In the caſe of the next of kin of a lunatic they are always conſidered as having more than merely an expectancy; for the Court calls upon them in the application of the perſonal property to object or conſent. They have therefore an inchoate intereſt; and yet they have no right to file a bill; having only that ſort of expectancy, of which the law cannot lay hold. Theſe defendants are in the ſame condition. There is a diſtinction between a bill to examine witneſſes *de bene eſſe* and this bill: the former is generally brought by a perſon out of poſſeſſion, and having witneſſes infirm or aged, or a ſingle witneſs, and in aid of his trial at law. This ſort of bill is directly the contrary: a bill brought by a perſon in poſſeſſion; having no opportunity to examine his witneſſes at law: the party meaning in future to reſiſt. *Philips* v. *Carew* (*b*), though in appearance a bill to perpetuate teſtimony, was in fact a bill to examine *de bene eſſe*. In oppoſition to this are *Parry* v. *Rogers* (*c*), and a dictum by Lord *Hardwicke* in *Brandlyn* v. *Ord* (*d*). *Shirley* v. Earl *Ferrers* (*e*), was alſo a caſe of examination *de bene eſſe*; and by a manuſcript note, it appears, that the order was made upon the defendant's refuſing to go to iſſue in the manner propoſed; and upon that Lord *Camden* refuſed a ſimilar application upon an affi-

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(*a*) *Mitf.* 138.
(*b*) 1 *P. Will.* 116.
(*c*) 1 *Vern.* 441.
(*d*) 1 *Atk.* 571.
(*e*) 3 *P. Will.* 77.

davit, that the witneſs was ſixty-three and impaired in his health, *May* 8th, 1769. In *The Duke of Dorſet* v. *Girdler* (*a*), reſpecting a right of fiſhery, it was held, that the plaintiff was entitled to examine his witneſſes; as he was in poſſeſſion; and there was no diſturbance. Theſe caſes really do not apply to the ſubject. In *Smith* v. *The Attorney General* (*b*), before Lord *Bathurſt*, aſſiſted by Lords Chief Juſtice *De Grey* and Chief Baron *Skynner*, it was laid down that any perſon having a real intereſt in reverſion or remainder may file ſuch a bill; and the Lord Chancellor referred to ſomething of the ſame kind laid down by Lord *Hardwicke*. In *Lord Suffolk* v. *Green* (*c*), which is ſimilar to the caſe of a perſon not diſturbed, but liable to be diſturbed, Lord *Hardwicke* ſaid, though it is not noticed in the Report, that he did not know, in what caſe a party has not a right to perpetuate teſtimony; but that he muſt have a right preſent or future. The poſition laid down in that way is not ſupported by deciſion; and is much too large. There are but two caſes on the ſubject: *Tyrell* v. *Co* (*d*), and *Seabourn* v. *Chilſton*, or *Seybourne* v. *Cliſton* (*e*). The former is rather againſt this demurrer. The defendant to ſuch a bill might have demurred; unleſs it was alleged, that the marriage had actually taken place. The other caſe appears in the Regiſter's Book (*f*) by the name of *Seabourne* v. *Cliſton*. It appears from the Regiſter's Book, that the bill was filed by the ſon and heir of *Seabourne* againſt a purchaſer under a forged deed. Mr. Juſtice *Archer* was deſired by the Lord Keeper to talk to the Judges upon it; and in 1670 the bill was diſmiſſed upon the plaintiff's motion, with 40*s.* coſts: the defendant's Counſel ſtating, that ſhe had taken advantage of a ſlip to put in a demurrer. It is eaſy therefore to conjecture what was the opinion of the Judges. The bill might have been amended.

Upon the ſecond point, a bill of foreclosure is never filed againſt any one except the tenant for life and the firſt tenant in tail: *Reynoldſon* v. *Perkins* (*g*). The depoſitions taken in one cauſe may be read in another, upon the ſame queſtion, againſt parties claiming under the ſame title. *Terwit* v. *Greſham* (*h*). *The Cor-*

(*a*) *Pre. Ch.* 531.
(*b*) In Chancery 1777.
(*c*) 1 *Atk.* 450.
(*d*) 1 *Roll. Ab.* 383.
(*e*) *Nelſ.* 125. cited 2 *Vern.* 159. 1 *Eq. Ca. Ab.* 354.
(*f*) *Reg. B.* 1669. *B.* Fol. 520. 1670 *B.* Fol. 499.
(*g*) *Amb.* 564.
(*h*) 1 *Ch. Caſ.* 73.

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poration of London v. *Perkins* (*a*). *Nevil* v. *Jabinſon* (*b*). *Earl of Bath* v. *Batherſea* (*c*).

All theſe parties are equally purchaſers under the ſame will. It is very extraordinary, that this bill ſhould not have been filed till after the death of *Hupſman*. There is no allegation, that *Tudor* is aged or infirm.

Mr. Mansfield, *Mr. Romilly*, *and Mr. Stanley*, *in ſupport of the bill*.—It is perfectly eſtabliſhed, that this bill lies for every perſon having a legal right; which he cannot bring into immediate diſcuſſion; however it ariſes. It is ſo deſcribed in *Mitford* (*d*); and the inſtance of a perſon in poſſeſſion without diſturbance is put only as one caſe, to illuſtrate the general doctrine; and in a ſubſequent part (*e*) it is ſtated, that a demurrer to this bill will ſeldom hold; excepting, where the ſubject can be immediately inveſtigated at law. In the only two caſes, mentioned as applicable, there was an immediate right, though not immediately veſted. *Seabourne* v. *Cliſton* is the only caſe, in which it is ſaid, ſuch a bill could not be ſupported upon a reverſion: but the nature of the caſe ſhews, no bill could be ſupported. Firſt, the plaintiff was a volunteer: 2dly, The defendant was a purchaſer under a forged deed; which he believed good. That ground appearing on the bill was ſufficient to prevent equity from giving any relief or aid againſt him. The other caſes cited have no application. The deciſions in theſe caſes are conſidered as deciſions againſt the eſtate; to which the party ſucceeds with all the obligations put upon it by this Court. The *Corporation of London* v. *Perkins* was upon tolls; as to which reputation is evidence. In *Smith* v. *The Attorney General* this point was treated as perfectly clear; and it was expreſsly ſtated, that a bill by a plaintiff in ſuch a ſituation will lie. Chief Baron *Skynner* ſays, it is not neceſſary, that the parties ſhould have a preſent intereſt; that it is more likely to be future; certain, though future. Lord Chief Juſtice *De Grey* ſays, there are caſes, in which there is a preſent right, but not poſſeſſion; as a remainder upon an eſtate for life in poſſeſſion; and contingent, executory, intereſts; which are rights in property; though not in poſſeſſion. That caſe proceeded upon the

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(*a*) 4 *Bro. P. C.* 157.

(*b*) 2 *Vern.* 447.

(*c*) 5 *Mod.* 9.

(*d*) *Mitf.* 51.

(*e*) *Mitf.* 131.

the want of intereſt preſent or future. The caſes of bills to examine witneſſes *de bene eſſe* proceed exactly upon the ſame ground; for the plaintiff cannot on account of the circumſtances have the benefit of that teſtimony immediately at law. The principle is the ſame. There is an immediate intereſt; which cannot be immediately tried at law.

Upon the circumſtances of this caſe, the ſecond marriage itſelf naturally excites doubts as to any prior marriage. There is a clear veſted intereſt in the plaintiffs. They cannot bring the matter into immediate litigation, having no preſent intereſt. None of them are purchaſers: they are all volunteers under the ſame will. The object of the bill is merely to perpetuate teſtimony, not to execute a truſt, or for any other relief. It is much to be lamented, that the difficulty of perpetuating teſtimony is ſo great; and that from the ſtrictneſs of the Law in rejecting hearſay evidence, admitted in the law of many countries, rights are loſt by the death of witneſſes. For ſuch a bill nothing more is neceſſary than that the plaintiff and defendant have an intereſt; but no authority requires that intereſt to be immediate and in poſſeſſion. A contingent remainder I ſhould have thought a ſufficient intereſt in the plaintiff: but theſe are veſted remainders.

Next as to the remoteneſs of the intereſt of theſe defendants. They complain, that the evidence may be uſed againſt them, and yet that they are put in a ſituation to croſs-examine. There is no deciſion, that a bill of this ſort will not lie againſt a party having a certain, though remote, intereſt. They have a clear intereſt, capable of fine and conveyance. In conſequence of death they may be the only perſons, with whom the plaintiffs or their iſſue may have the conteſt. The ground is, that there is a right, which cannot immediately be brought into diſpute. Parties having truſts to execute, &c. certainly need not go farther than the firſt tenant in tail: though I do not know, that it has been decided, that they may not, to meet the accident of death, and avoid bills of revivor. But the preſent ſubject of conſideration is not what is to be done, where the eſtate is to be acted upon. The inconvenience, miſchief, and failure of juſtice, are all on one ſide; if there are no means of preſerving the teſtimony between perſons, having a right in an eſtate, and others, having a future right, naturally leading to a conteſt. In ſuch a bill as this the plaintiff is bound to pay the coſts. The evidence taken againſt a firſt tenant in tail could not be uſed at law againſt a remote tenant; and I ſhould have thought it alſo clear in this Court: there being no privity between them: but clearly not at law; and the only object of the bill is to preſerve evidence to be uſed at law. All, that has been decided is, that it is not neceſſary to make more than the firſt tenant in tail parties: 2 *Eq. Ca. Ab.* 166. Pl. 8. The ground is the inconvenience; upon which a poſitive rule has been eſtabliſhed, that, where the firſt tenant in tail is before the Court, no perſon more remote ſhall diſpute that decree: but that is only a poſitive rule of Equity: a very wiſe rule, from the great inconvenience, expence, and delay, by making ſo many parties. That cannot apply, where nothing is deſired but to preſerve evidence for a Court of Law; and it is impoſſible to draw any inference from the caſes requiring relief. The principle of this bill is to guard againſt the inconvenience, that may happen at ſome future time by the loſs of the evidence: an inconvenience much more likely to happen with regard to a remote title. This very caſe was put by Lord Chief Juſtice *De Grey*; who ſays, perhaps ſuch a bill may be filed by a perſon entitled in remainder in tail under a ſtrict ſettlement, ſuſpecting a perſon prior to him to have been born before marriage; and he obſerves, that the intereſt may never take effect; as the eſtate tail may continue for ever. No inſtance has been produced of a demurrer by a ſubſequent remainder man, becauſe not made a party. In *Mildmay* v. *Mildmay*, a bill as to timber, Lord *Redeſdale* was of opinion, that all the remainder men *in eſſe* ſhould be made parties.

Mr. Richards in reply—No inſtance is produced of perpetuating teſtimony againſt an intereſt behind a tenant in tail. It is no anſwer, that the defendants are entitled to their coſts; and that practice itſelf ſhews, that it is improper to bring any perſon but the firſt tenant in tail before the Court. Where the Court is called upon to execute a truſt, the rule is general; that if a defendant is not a neceſſary party, he may demur. In *Mildmay* v. *Mildmay* the perſons ſtanding behind the tenant in tail did not object: 2dly, the queſtion was as to cutting timber; and in whom was the property of the timber cut: whether it ought not to be ſecured in Court for the firſt tenant in tail attaining twenty-one, capable of alienating. If this deviſe had been to the uſe of truſtees, in truſt for Lord *Berkeley* for life, with remainder to his firſt and other ſons in tail, remainder over, and the firſt ſon filed a bill, calling on the truſtees to execute any prior truſt, and then to convey, ſuggeſting a doubt, whether he was legitimate, and wiſhing to eſtabliſh his right againſt the truſtees, he muſt have made the next brother a party; having the queſtion to litigate with him. Can it be neceſſary to bring all the remainder men before the Court? It may be ſo, for the purpoſe of acting upon the eſtate, *ſub modo*; but not in ſuch a caſe as this; and where there are ſix other remainders in tail, before theſe defendants can be introduced. Their intereſt is of no value whatſoever. It is very inconvenient therefore, that they ſhould be put to the expence of this ſuit. Lord Chief Juſtice *De Grey* in the paſſage referred to expreſſes that opinion with a degree of caution; and the caſe he puts is not of a tenant in tail after ſix others. Suppoſe the number greater: it would be extremely haraſſing to hold, that they may all be made parties, merely becauſe hereafter they are to have their coſts; which is no ſort of remuneration.

Lord Chancellor—Before I decide this caſe, which is very ſingular, I ſhall look into all the authorities cited; not on account of the ſingularity of the caſe, but as to the general doctrine. No difficulty is alleged as to examining *Tudor*. In arguing this demurrer the fact as to the firſt marriage muſt for the preſent be taken to be true. The queſtion therefore is, whether according to the rules of this Court the plaintiff has a right to perpetuate the teſtimony of that circumſtance, taken for the preſent as a fact? It is going beſide the fact to examine the probability, or the reaſon of not bringing forward the alleged illegitimacy in the life of the clergyman; who, it is alleged, celebrated the marriage. The ſtory does not hang very well together, as to the publication of banns in the pariſh church, recommended by him as the beſt mode of keeping the marriage ſecret. There might be a marriage *de facto*, and a colourable publication of banns; and it might be convenient to him, that the real circumſtances, by which he had contrived a marriage *de facto*, ſhould not come out. His greater or leſs degree of criminality however certainly cannot affect theſe children. I muſt alſo lay out of the queſtion, whether there could be a more convenient, juſt, or effectual, mode of aſcertaining the fact of the marriage at preſent; or, whether it could be aſcertained. The bill does not ſeek to aſcertain it; but to preſerve the means of duly trying the fact; when an opportunity ſhall ariſe of conveniently and uſefully trying it. This plaintiff comes, ſtating himſelf not to have the means by any gift of property by his father or otherwiſe of trying the queſtion at preſent: his father not having furniſhed thoſe means by a conveyance or ſurrender of his eſtate. The queſtion therefore is, whether a tenant in tail in remainder, without the means of provoking a trial at preſent, can file ſuch a bill. It appears to me very difficult to conceive, that he has not that right. The caſe of *Smith* v. *The Attorney General* went upon this; that the next of kin of the lunatic had no intereſt whatever in the property. Put the caſe as high as poſſible; that the lunatic is inteſtate; that he is in the moſt hopeleſs ſtate, a moral and phyſical impoſſibility, though the Law would not ſo regard it, that he ſhould ever recover, even, if he was *in articulo mortis*, and the bill was filed at that inſtant, the plaintiff could not qualify himſelf as having any intereſt in the ſubject of the ſuit. The caſe of an heir apparent was very properly put by Lord Chief Juſtice *De Grey* in his moſt luminous judgment. Upon that occaſion he ſaid, he never liked Equity ſo well as when it was like Law. The day before I heard Lord *Mansfield* ſay, he never liked Law ſo well as when it was like Equity; remarkable ſayings of thoſe two great men, which made a ſtrong impreſſion on my memory. Lord Chief Juſtice *De Grey* ſaid, that at Law the heir apparent cannot have the writ *de ventre inſpiciendo* in the life of his anceſtor; as for that purpoſe he muſt be *verus hæres*. If the anceſtor was in a fever, a delirium, having made no will, and it was not poſſible for him to recover, ſtill the Law would look upon him as mere heir apparent, having nothing but an expectation, which is different from an expectancy in the legal ſenſe, and as having no intereſt whatever upon that ground. In *Smith* v. *The Attorney General* it was held, that the bill would not lie. It is not to be taken upon the ſingle dictum of any of the learned Judges, who aſſiſted upon that occaſion: but the whole judgment went upon diſtinguiſhing between that expectation, which the next of kin have in that caſe, and any ſort of right, which the Law allows to be an intereſt. A contingent intereſt is not the leſs a preſent intereſt. It was not doubted in that judgment, that a veſted intereſt,

The next of kin of a lunatic, however hopeleſs his condition, have no intereſt whatever in the property; and therefore cannot ſuſtain a bill to perpetuate teſtimony. So an heir apparent cannot have a writ *de ventre inſpiciendo*. But they may contract upon their expectations; and may perpetuate teſtimony with reference to the intereſt ſo created.

tereſt, though in poſſibility the leaſt valuable, that could be conceived, is yet of ſome value in conſideration of Law; and gives a right to preſerve teſtimony. In the courſe of that cauſe caſes were cited; which go to this; that though the next of kin could not file a bill, or the heir apparent in the caſe put, yet they might reſpectively enter into contracts with reſpect to their expectations and poſſibilities; the evidence upon which they might perpetuate. The Law would frame an intereſt in reſpect of the contract; and with reference to that they would have a right to perpetuate teſtimony; though they could not qualify themſelves as to any intereſt in the ſubject itſelf.

It appears therefore, that unleſs there are grounds for entertaining doubt, with which at preſent I am not impreſſed, the plaintiff has a ſufficient intereſt to ſupport this bill; if theſe defendants are proper parties. As to that, independent of the intermediate eſtates tail, upon the principles I have already ſtated there can be no doubt; for their intereſt is exactly of the ſame ſpecies; though leſs valuable, becauſe poſterior. Next, does the intervention of the other eſtates tail prevent their being proper defendants? If ſo, the converſe muſt certainly be maintained; for if theſe eſtates tail intervening could prevent their being defendants, the conſequence would follow, that if theſe defendants contended upon the ſtrongeſt evidence of circumſtances, that the elder children were illegitimate, and were able to repreſent this caſe, that the two youngeſt children were of very tender years, and of ſuch puny conſtitutions, that there was no moral probability, that either of them would attain the age of twenty-one, it muſt be admitted upon theſe principles, that theſe defendants could not as plaintiffs ſuſtain a bill of this ſort. That would not be very convenient to juſtice. I can conceive a power in a tenant in tail to ſay, a remainder man ſhould not file ſuch a bill. Suppoſe an eldeſt ſon illegitimate; and the father expreſsly deviſed to him in tail; leaving the reverſion to deſcend; and that he alſo had a ſon by marriage: and a diſpute had ariſen; the eldeſt inſiſting, he was not illegitimate; and the younger, that the firſt marriage was to his mother; and he, as reverſioner ſhould file a bill to perpetuate teſtimony. I am not quite ſure, that in ſuch a caſe the elder might not ſay, he being in poſſeſſion as tenant in tail might ſuffer

The Court will not perpetuate teſtimony of a right; which may be immediately barred by the defendant.

a Recovery, and deſtroy the reverſion; and therefore equity could not interfere. That might perhaps be ſuſtained by analogy to other caſes: as, where there was a tenant of a leaſe for lives to him and the heirs of his body; and the leaſe was renewed to him and his heirs: according to the ordinary doctrine the equitable title would attach upon the legal eſtate; and upon a bill by a perſon entitled in remainder, for the purpoſe of attaching the equities of the old leaſe upon the new one, the Court ſaid, it was nugatory; for by a deed he might bar them all; and ſay, he did not chooſe, the equities of the old leaſe ſhould attach upon the new one. That might poſſibly apply to the caſe I have juſt put, and ſupport a demurrer by the elder ſon to the bill of the younger, upon the ground, that a Recovery would bar him.

But that is very different from this caſe; for no one can at preſent bar the eſtate tail. The argument cannot vary from the number of eſtates tail. Theſe defendants at the utmoſt can only contend, that there are two remainder men in tail, infants; neither of whom may ever be able to bar them. As to the conſequence in point of convenience, I am much ſtruck with the argument in ſupport of the bill. Is it inconvenient to general juſtice or to theſe defendants, that they ſhould be parties? Firſt, the queſtion imports all the perſons to take an eſtate; all the intereſts making up the fee; and it is as neceſſary in the view of what general juſtice requires, that the teſtimony ſhould be perpetuated againſt theſe defendants as that they ſhould perpetuate the nonexiſtence of the plaintiff's title; and with regard to the individuals it cannot be unjuſt to ſecure to theſe defendants the opportunity of croſs examining now to the extent, in which there muſt be a croſs-examination. They muſt decide for themſelves as to the prudence of leaving the ſtory with all the doubt, that hangs about it, or of croſs-examining: but if it is fit to croſs-examine, juſtice requires, that the defendants, who may be affected by the evidence, (for it is admitted in the argument for the demurrer, that the evidence will bind them) ſhould have the opportunity of deciding for themſelves, whether it is prudent, and whether they will now have the croſs-examination. I expreſs it thus; for it may be, that now only they will have the opportunity. I agree to the anſwer to the objection as to the coſts. It is a ſufficient ground for protecting a defendant from a ſuit, that he may be vexed by it, independent of any pecuniary conſideration; and if he can defend himſelf againſt the demand, it is not an anſwer, that he will ſome time or other have his coſts.

In my preſent view of this caſe the demurrer muſt be overruled; unleſs I ſhould alter that opinion upon looking at theſe caſes.

July 9.

Lord CHANCELLOR—I have looked through all the caſes upon this ſubject; and I cannot find any caſe having a tendency to affect the opinion I intimated, except that caſe ſtated in *Eq. Ca. Ab.* and alſo in *Vernon*, under the name of *Seaborne* v. *Clifton*; which in both books ſtands thus: a bill by a perſon, claiming a reverſion, to perpetuate teſtimony, againſt a purchaſer for valuable conſideration. The books treat the demurrer as having been allowed upon that ground; and in *Vernon* it is ſtated, that the bill was diſmiſſed; and the party loſt the eſtate for want of examining the witneſſes. I am much obliged to Mr. *Holliſt*; who has furniſhed me with an extract from that caſe in the Regiſter's Book; from which it appears, that the caſe amounts to no deciſion at all. The ſon filed the bill upon this point; that his deed was genuine; and the other forged. The cauſes of demurrer were, 1ſt, that this was a ſtrange Court to prove a forgery in: 2dly, a purchaſe for valuable conſideration. The Judge preſiding here gave no opinion; but deſired Mr. Juſtice *Archer* to talk with the Judges upon it. The reſult does not appear. Unqueſtionably the bill was not diſmiſſed upon any of the grounds ſtated in the printed books: but under a ſuggeſtion, that the defendant had taken advantage of a ſlip to put in a demurrer, leave was given to the plaintiff to withdraw his bill on payment of very moderate coſts. That is by no means an authority, that, if two perſons are claiming a reverſion, where one only can be entitled to it, a bill to perpetuate teſtimony will not lie. Nor did it eſtabliſh a principle, which I think very difficult to maintain, that, if one of them had ſold his title to a third perſon, a bill to perpetuate teſtimony could not be maintained; for ſuch a bill calls for no diſcovery from the defendant; but merely prays to ſecure that teſtimony; which might be had at that time, if the circumſtances called for it. If therefore that caſe had only this diſtinction, of a purchaſe for valuable conſideration, it would require a good deal of conſideration, before it ſhould be diſpoſed of, as turning upon a principle not applicable to this caſe. But, taking that not to be an authority upon this caſe, and particularly not to be an authority upon the reaſons given in the printed books, it ſeems to me, that, independent of the circumſtance of there being four plaintiffs here and ſix tenants in tail, the whole reaſoning in *Smith* v. *The Attorney General* goes to this point; that a remainder man has a preſent intereſt, future in enjoyment, but as real in the contemplation of the Law, as if he was then ſeiſed in fee; and as againſt another perſon having a real intereſt of the ſame nature that caſe has gone the length of deciding, that a bill to perpetuate teſtimony is capable of being ſupported, and a demurrer to it could not be allowed.

The ſpecialties of the caſe are, that there are four plaintiffs, all tenants in tail, and two defendants, tenants in tail, ſtanding at all events with priority of intereſt and priority of title to Admiral *Berkeley* and his ſon: but upon the principles I before ſtated it ſeems to me, that thoſe ſpecialties will not take this caſe out of the rule; particularly, where the two tenants in tail are infants, and never may have the enjoyment; and where upon the ſingle fact of a legal marriage in 1785 the title of all theſe children will be to be decided. I am much ſtruck with the circumſtance (though it may have been unavoidable) that the bill ſtates a caſe clear of doubt; and then clothes it with infinite doubt; for it ſtates this caſe; that there was a marriage in fact in 1785; that there is a living witneſs of that marriage; that there is a Regiſter; that there was a due publication of banns, and that there is now an entry of the marriage producible, ſigned by the parties and by the witneſſes to that marriage. If theſe circumſtances ſtood alone, the bill would not ſtate a caſe of any doubt or a caſe of periſhable teſtimony, if I may ſo expreſs myſelf: but upon the whole enough has been ſtated of the circumſtances upon this bill to raiſe as queſtionable a caſe in fact as could be put upon a record; for it ſtates, that the marriage was for certain reaſons intended to be kept ſecret for ſome time; and the means of accompliſhing that object are certainly very ſingular: the marriage being attended with as much publicity and notoriety as could be given to it: a

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marriage in the pariſh church of *Berkeley*; and according to this bill, attended with a due publication of banns; with all the circumſtances, that belong to a marriage; a due regiſtry and ſigning by all the parties preſent; and it alleges, that the thing was quite notorious; that the clergyman and parties were conſtantly talking about it; and it became the habit and repute of the place. The bill alleges, that becauſe apprehenſions were entertained, upon what foundation does not appear, that the regiſtry was loſt, and becauſe the clergyman was dead, and one of the witneſſes was either dead or not to be found, under theſe circumſtances it was thought prudent to have another marriage. As a circumſtance of evidence for the conſideration of a Jury that is pregnant with a great deal of obſervation; for however prudent it might be as to the future iſſue, it was not marked with ſingular prudence to marry again under the maiden name of the lady, in order to prove the legitimacy of four children born antecedent to the ſecond marriage. A great deal of conſideration ought to be had, if this ſhould come before a Jury, which courſe it probably muſt take at laſt, as to the actual treatment of the children, born before and after this marriage, in the family.

But whatever difficulties ariſe in my mind upon this, the plaintiff has ſtated upon his bill a caſe of an actual legal marriage, to be proved under all the difficulties, that belong to it: with reſpect to which I think upon the principles I ſtated before he has a right to perpetuate teſtimony. Independent of the conſideration of general juſtice, and the particular ground in this caſe, caſes might be put, and none can warrant the obſervation more than this cauſe, in which a bill to perpetuate teſtimony may be an exceſſively dangerous proceeding; and upon that ground it is handſomely done towards juſtice by the plaintiff to make Admiral *Berkeley* and his ſon parties. He muſt be well acquainted, or at leaſt has a better chance than others of being acquainted, with all, that has paſſed in the family; and therefore he will have the opportunity, if he chooſes to make uſe of it, to take a complete view of all the circumſtances, to decide upon the condition of theſe children, and to bring out all the known facts; that it may be determined for the ſake of thoſe, who are infants, what it may be proper to do with regard to the croſs-examination; whether there ſhould be any croſs-examination; or, if any, to what extent.

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I do not know, who is the next friend of the children claiming under the ſecond marriage: but I muſt ſay, that, whoever he is, no man ever took upon himſelf a more ſolemn and more delicate duty. If he for any reaſons of connection with any part of the family does not exert himſelf for thoſe children as zealouſly as if he was ſupporting his own claim to the deareſt intereſt in life, he does not do his duty to thoſe children. I ſay this; becauſe, though this bill may be as properly conducted, as it may be moſt eſſential to the juſtice due to the children claiming under the firſt marriage that it ſhould be conducted, yet if it ſhould not be ſo conducted, it may be an inſtrument of miſchief and oppreſſion, or what would even require a harſher name, to the children claiming under the ſecond marriage. It is ſome conſolation to the Court, that the bill can be maintained againſt perſons, who have an intereſt of a pecuniary value; which will enable them to aid thoſe, who ſtand in the ſacred relation of next friend to the children claiming under the ſecond marriage.

Demurrer overruled.

July 8, 9.

GIBSON *v.* JEYES.

Sale of an annuity by an attorney to his client ſet aſide under the circumſtances.

THE bill was filed by the adminiſtrator of *Ann Kerby* to ſet aſide the ſale of an annuity by the defendant *John Jeyes* to *Ann Kerby* for her life under the following circumſtances.

Mrs. *Kerby*, a widow, above the age of ſeventy, reſiding at *Northampton*, employed *Jeyes*, an attorney of the ſame place, as her agent. The tranſaction, which produced this ſuit, took place in 1798. Mrs. *Kerby*, being poſſeſſed of 900*l.* 4 *per cent.* Bank Conſolidated Annuities, 100*l.* of which the defendant had ſold out for her under a letter of attorney in *May* 1798, executed a letter of attorney, dated the 21ſt of *November* 1798, empowering *Theophilus Jeyes*, the ſon of the defendant, to ſell out the remaining 800*l.*; which he accordingly did, for the ſum of 514*l.* 17*s.* 6*d.* Soon afterwards the defendant received 400*l.*, as the conſideration agreed upon for an annuity of 50*l.* a-year to Mrs. *Kerby* for her life; for ſecuring which he gave her his bond, dated the 26th of *December* 1798, in the penalty of 800 *l.* *Jeyes* at that time was at the age of eighty. Mrs. *Kerby* died upon the 28th of *March* 1799, about three days after the firſt quarter became due, but not having received any part of it except two guineas from young *Jeyes*. Her death was in conſequence of a paralytic ſtroke. Before this tranſaction ſhe had attempted to ſell a houſe, with a view to purchaſe an annuity; which project failed from a difficulty in the title.

The bill prayed, that the ſtock might be replaced; and charged, that this tranſaction was a fraud; that from the age as well as ſtate of health of Mrs. *Kerby* the price was much more than the annuity was worth, and might have been purchaſed for according to the Office calculation; that at the times of executing the two powers of attorney and the bond ſhe was ſo debilitated in her mind as to be incapable of forming any judgment for herſelf upon the tranſaction or of tranſacting buſineſs; and that *Theophilus Jeyes* was obliged to point out to her the letters of her name; which fact was not denied.

It appeared by the evidence of the apothecary, who had attended her many years, that from the 26th of *October* to the 2d of *November* 1798 ſhe was very much indiſpoſed by a violent bilious complaint; from which ſhe ſoon recovered; and it did not appear to him to have affected her mind. But by the other evidence produced by the plaintiff, conſiſting of ſervants, who were conſtantly with her, and friends and others, who ſaw her frequently, imbecility of mind in a conſiderable degree, increaſing for three or four years previous to her death, was eſtabliſhed; and it appeared, that ſhe did not underſtand the nature of the tranſaction with *Jeyes*; having a notion, that he was to keep her money for her, and let her have it, as ſhe wanted it. This was oppoſed on the part of the defendant by the evidence of perſons, who ſaw her occaſionally, in favour of her general capacity, and her health, conſidering her time of life. *Theophilus Jeyes* by his depoſitions in ſupport of the anſwer of his father repreſented, that Mrs. *Kerby* had been very anxious to increaſe her income by the purchaſe of an annuity for her life; for which ſhe had made applications to different perſons; but refuſed an offer from *William Gibſon*, the father of the plaintiff; who ſaid, he would give more than any one elſe; and actually offered an annuity of 60*l.*, ſecured upon land; declaring her reaſon, that ſhe would have no concern of buſineſs with him. The deponent adviſed her to defer her purpoſe; the Stocks being then low; and after ſome delay upon her ſtill perſiſting recommended her to accept the offer of *Gibſon*; to which ſhe poſitively objected; ſaying ſhe would have nothing to do with him, and complaining, that he had not behaved well to her. After ſome days ſhe expreſſed a wiſh, that the deponent would aſk the defendant to grant her an annuity for her life; which the defendant at firſt refuſed; but being repeatedly preſſed at length complied with reluctance. The deponent had procured for her the table of the terms of the Royal Exchange Aſſurance Office; and ſhe declared, ſhe would much rather purchaſe an annuity from the defendant; but would from the Office, if he refuſed. She ſtrictly enjoined the deponent not to mention, that this buſineſs had been ſo ſettled, to any perſon, and particularly to *William Gibſon*; with whom ſhe was then on tolerable terms, and did not wiſh to fall out with him; but was determined to have no dealings with him, *&c.* She afterwards upon receiving the bond regiſtered expreſſed her ſatisfaction. On the 22d of *March* 1799 ſhe ſent for the money, that would be due to her on Lady Day; and the deponent ſent her two guineas on account of the firſt quarterly payment of the annuity.

Other witneſſes alſo ſtated, that previouſly to Chriſtmas 1798 ſhe had expreſſed uneaſineſs, that ſhe could not prevail upon Mr. *Jeyes* to take her money upon the terms ſhe wiſhed, *viz.* to allow her a yearly ſum in lieu thereof; and afterwards, ſhe expreſſed her ſatisfaction at having prevailed upon him to do ſo.

The Actuary of an Aſſurance Office, examined on behalf of the plaintiff, ſtated, that a perſon of the age of ſeventy years and a half in as good a ſtate of health as perſons generally enjoy at that age ought for a ſum of 400*l.* to receive an annuity, payable quarterly, of 64*l.* 3*s.* during the term of ſuch perſon's natural life: but a perſon of that age in an infirm ſtate of health ought to receive more. The Actuary of another Office on the other ſide depoſed, that, ſuppoſing Mrs. *Kerby* to have been of the age of ſeventy years and a half, and not labouring under any particular complaint or infirmity of body, but enjoying a good ſtate of health, and living a regular life, and not given to any kind of exceſs, the value of an annuity of 50*l.* a year for her life, payable quarterly, was 438*l.* 10*s.*; which is eight years and about three quarters of a year's purchaſe; which was the fair price of the ſaid annuity on the 26th of *December* 1798, under the circumſtances aforeſaid.

The defendant ſtated, that previouſly to this tranſaction the partnerſhip between him and his ſon had ceaſed: but the weight of evidence was the other way; and an advertiſement of a ſubſequent date in their joint names as partners was produced.

The Solicitor General, *Mr. Sutton*, *and Mr. Stratford for the plaintiff*—The evidence in this caſe does not amount to this; that *Jeyes*, the father, ſuggeſted the idea of the ſale of an annuity: but it proves, that, however that was ſuggeſted, he took advantage of this old lady. The grounds, upon which this relief is ſought, are inadequacy of conſideration, the circumſtances of imbecility, under which ſhe engaged in this tranſaction, and principally the ſituation of the defendant as an attorney. It is in evidence, that upon executing the power of attorney to ſell out the ſtock, *Jeyes* the younger was under the neceſſity of pointing out to her the letters of her name. It is not probable, that at that time the defendant did not know what was to follow. The principle, upon which theſe caſes turn, is ſtated by Mr. *Mansfield* in *Fox* v. *Mackreth* (*a*); that where one perſon takes an unfair advantage of another, it is the peculiar province of equity to give relief.

Upon the third ground, attorneys are not to be permitted to deal with their clients upon the ſame terms as other perſons; and every ſort of diſcouragement ought to be thrown in the way of ſuch tranſactions: *Wamſley* v. *Booth* (*b*): *Newman* v. *Payne* (*c*). Every principle applying to truſtees applies equally to attornies. This caſe illuſtrates the principle, that it is neceſſary to hold a ſtrong hand over dealings between attorneys and their clients. If this was not the caſe of an attorney, it affords the ſtrongeſt ſuſpicion of impoſture, from the circumſtance, that no attorney was preſent at the tranſaction, connected with age, infirmity, and exorbitant

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(*a*) 2 *Bro. C. C.* 400. (*b*) 2 *Atk.* 25. (*c*) *Ante*, vol. 2. 199.

terms; eſpecially, when compared with the terms offered by *Gibſon*, a relation of the family; who offered 60*l.* and landed ſecurity. The ſcruples, which it is ſaid ſhe had, might have been eaſily overcome by the defendant.

Mr. Manſfield, Mr. Lloyd, and Mr. Fonblanque, for the Defendant—This defendant had ceaſed to be attorney to Mrs. *Kerby*; and was ſucceeded in that character by his ſon. The rules as to attorneys therefore have no application. But there is no rule, that an attorney may not deal with his client, if he deals upon fair terms. Certainly the Court cannot watch the tranſaction too narrowly. In *Swayne*'s caſe (*a*), determined by Lord *Northington*, he was truſtee as well as attorney; yet the tranſaction was eſtabliſhed. It is now fully ſettled, that a truſtee, whether attorney, or not, may, if the agreement is fair, buy of his *Ceſtuy que* truſt. In many caſes the Court has relieved upon collateral circumſtances; but never upon the ſingle circumſtance, that one party was the attorney. As to the circumſtances attending this tranſaction, the price is fair; and Mrs. *Kerby* does not appear to have been more infirm than is uſual at her time of life; and her diſorder according to the evidence of a medical man was not of a nature to affect her mind; and ſhe ſoon recovered. The evidence for the plaintiff would be very dangerous to found a decree upon. The rule as to weakneſs is ſtated by Sir *Joſeph Jekyll* (*b*): where a weak man gives a bond, if there be no fraud or breach of truſt in obtaining it, equity will not ſet it aſide only for the weakneſs of the obligor, if *compos mentis*: neither will this Court meaſure the ſize of people's underſtandings: there being no ſuch thing as equitable incapacity, where there is legal capacity: but if a bond be inſiſted to have been given for a conſideration, where it appears there was none, or not near ſo much as is pretended, equity will relieve againſt it. The real queſtion between theſe parties is, whether the price was fair. The defendant adopted the ſcheme of the inſurance Office; and has taken leſs than they would have required.

Lord Chancellor—I do not mean to contradict the caſes of truſtees buying from their *Ceſtuys que* truſt: but the relation between

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(*a*) Cited 2 *Bro. C. C.* in *Fox* v. *Mackreth.*
(*b*) 3 *P. Will.* 129. in *Oſmond* v. *Fitzroy.*

tween the parties muſt be changed: that is, the confidence in the party, the truſtee or attorney, muſt be withdrawn. That is the principle of the caſes of a truſtee buying for himſelf. There is evidence enough in this caſe, that Mrs. *Kerby* knew what ſhe was about; though the younger *Jeyes* has not denied the very ſerious charge againſt him, that he was obliged to point out the letters of her name, when executing the power of attorney. The evidence of incapacity relates to the ſtate of her body: but it is clear, her mind had ſuffered by the ſhock her health had received. An attorney buying from his client can never ſupport it; unleſs he can prove, that his diligence to do the beſt for the vendor has been as great, as if he was only an attorney, dealing for that vendor with a ſtranger. That muſt be the rule. If it appears, that in that bargain he has got an advantage by his diligence being ſurpriſed, putting fraud and incapacity out of the queſtion, which advantage with due diligence he would have prevented another perſon from getting, a contract under ſuch circumſtances ſhall not ſtand. The principle, ſo ſtated, may bear hard in a particular caſe: but I muſt lay down a general principle, that will apply to all caſes; and I know none ſhort of that, if the attorney of the vendor is to be admitted to bargain for his own intereſt; where it is his duty to adviſe the vendor againſt himſelf. The younger *Jeyes* did not do his duty; as the Court would expect it. I put the queſtion thus, without adverting to his taking the power of attorney, and ſelling the ſtock, before any ſpecific treaty for an annuity was entered into. It was his duty to have duly informed himſelf of the ſtate of her health and the other circumſtances; with reference to which perhaps many perſons would have dealt upon much more liberal terms than either an Office or the defendant. I cannot conſider perſonal ſecurity as ſufficient. But, from the general danger the Court muſt hold, that if the attorney does mix himſelf with the character of vendor, he muſt ſhew to demonſtration, for that muſt not be left in doubt, that no induſtry he was bound to exert would have got a better bargain. Therefore, without imputing fraud, a general principle of public policy makes it impoſſible, that this bargain can ſtand.

For the defendant.—The difficulty upon *Heathcote* v. *Paignon* (a) is, that it is impoſſible to find the exact market price of an annuity on account of the difference as to age, health and circumſtances. The difference of value upon this evidence is not that great difference, to which Lord *Thurlow* alludes. With reſpect to the rule as to an attorney dealing with his client, it is of great importance to define it with exactneſs. So far as he is contracting with his client upon any matter, that might be the ſubject of his profeſſional ſkill, there can be no better rule than that, which requires him to employ the extraordinary degree of diligence, that he would employ, if contracting on behalf of his client with a third perſon. But is it to be applied to every other tranſaction; for inſtance, the purchaſe of a horſe, or any other ſubject, not involving that confidence in his judgment which introduces the rule, and upon which it is founded? In *Newman* v. *Payne* the Lord Chancellor with every diſpoſition to raiſe the rule as high as poſſible left the tranſaction as to the horſe, where he found it; and did not bring that within the general principle.

(a) 2 *Bro. C. C.* 167.

The Solicitor General in reply—The circumſtance, that the defendant was the attorney, is ſufficiently brought in iſſue to put it upon him to get rid of it. Almoſt all the witneſſes ſpeak to his being the attorney, and his ſon in partnerſhip with him. With reſpect to the objection, that the rule cannot extend to a purchaſe, which is not the ſubject of profeſſional ſkill, as a horſe, the knowledge of the circumſtance, that the client wants a ſum of money, may be very convenient; and is therefore by no means immaterial even upon ſuch a purchaſe. But this purchaſe was connected with the duty of an attorney to watch over the intereſt of the client, and warn her againſt an improvident bargain. The ſale of the ſtock was with a view to the purchaſe of ſome annuity; and it is all one tranſaction.

Lord CHANCELLOR—This caſe is put firſt upon incompetency to make ſuch a contract: 2dly, Upon the inſufficiency of the conſideration; and the laſt ground is, that, if upon the mere incompetency or deficiency of the conſideration there is no ground for relief, yet in the relation of the parties contracting the Court can find a principle, upon which they will reſcind the contract; though between parties not ſo connected they might have permitted it to ſtand. Attending to the third ground, there is enough in this caſe to authorize the Court to ſay, there is probable evidence of incompetency; and evidence of ſome degree of inſufficiency of conſideration, that can be felt, not as Lord *Thurlow* ſaid in the caſe referred to, but as extremely material evidence, where it is to be connected with the third ground; whether that reaſonable attention has been given to the intereſt of the purchaſer, which under all the circumſtances *Jeyes* was bound to give that intereſt. But I go a great deal farther; for upon the tranſactions diſcloſed by the evidence it is fairly queſtionable, whether this caſe might not ſupport a Commiſſion, not of lunacy, but in the nature of a writ *de lunatico inquirendo*; in which it muſt be remembered, it is not neceſſary to eſtabliſh lunacy; but it is ſufficient, that the party is incapable of managing his own affairs. I do not ſay, all this fell under the view of *Jeyes*; if it can be eſtabliſhed with regard to the acts of this lady: but it is not ſufficient to protect a party againſt the effect of ſuch a proceeding, if it could be made out, that in viſits ſuch paſſages in her conduct did not fall under the obſervation of thoſe, who viſited her; for the proceeding would be to protect her againſt what her acts might be, when ſuch acts did fall under the obſervation of third perſons. Taking into conſideration the circumſtance of the execution of the power of attorney, and the folly of what ſhe did, grounded upon the apprehenſion, that her income muſt be raiſed by any means, imbecility of mind and great improvidence are in this reſpect eſtabliſhed; and upon a trial, whether ſhe was to be truſted with the general management of her affairs, which would take in the periods, when ſhe was in that ſituation, the probable reſult would be incapacity to that extent.

To ſupport a commiſſion in nature of a writ *de lunatico inquirendo* it is ſufficient, that the party is incapable of managing his own affairs.

With regard to the inſufficiency of value, where the caſe is put upon mere inadequacy (*a*), no relation whatſoever ſubſiſting between the parties, inducing one to repoſe confidence, and putting the other under the obligation of all the duty that ſituation requires, it was ſtated by Lord *Thurlow* in thoſe caſes, that you cannot affect the bargain upon mere inadequacy; unleſs it is ſo groſs as to ſhock the conſcience of any man, who heard the terms. That principle is looſe enough: but it is one, by which Judges in Equity have felt themſelves bound, and to act upon occaſionally for the ſafety of mankind. There is no pretence for ſaying,

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(*a*) *Moth* v. *Atwood, ante*, vol. 5. 845.

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the inadequacy in this caſe is groſs in that degree. If it ſtood therefore upon that ground merely, it would be very hazardous to reſcind this tranſaction. But the reſult is, that there is at leaſt a moſt high moral probability, that with that diligence, which I will not ſay deſerves a higher character than that of reaſonable diligence, better terms might have been obtained for this lady.

I do not enter into the propriety of what was or was not done in former caſes with reference to the market price of an annuity. If ſuch a caſe ſhould ariſe before me, my mind will be diſtreſſed by a number of conſiderations, that have hung upon it for many years as to that claſs of caſes. To ſay, in the caſe of a grantor of the age of thirty, who has been covered with diſeaſe, probably affecting the duration of life, for many years, and in a greater or leſs degree, that is not to be conſidered with reference to the fairneſs of the bargain, is not eaſily reconcileable to reaſon. I am ſure, it is not reconcileable to fact, even upon the Court's own principle; for when Lord *Thurlow* got the length of thinking it fit with regard to inſurance to conſider that circumſtance, it ſeems equally reaſonable, that in determining upon the adequacy of value he muſt look at the nature of the life itſelf; upon the nature and circumſtances of which the inſurance turns. Another circumſtance is to be attended to. What an annuity is worth depends upon the circumſtances of the party and the ſecurity. But it depends upon much nicer points: the prudence of the grantor; who may be in circumſtances at the time quite unexceptionable. I cannot ſee, upon what principle it is ſaid, the market price is to determine. In *Heathcote* v. *Paignon* the market price was reported to be ſix years purchaſe; and it was aſſerted in the Report, which made no ſort of diſtinction upon the circumſtances of the grantor, the nature of the ſecurity, the ſtate of health, or any one fact, that would enter into the conſideration of a prudent purchaſer, and even of an honeſt ſeller. The grantor was a young man, about thirty: but he had had two or three ſmart fits of the gout; and he was a young man, whoſe ſtate of life as to the duration of it, with reference to that circumſtance, was one, at which no prudent man could ſhut his eyes, nor any honeſt man deſire it. Therefore upon the ordinary caſes of annuities I muſt enter into the circumſtances; or ſay, that notwithſtanding all, that prudent and honeſt individuals would do out of Court, I muſt determine upon the market price in all caſes.

But it is not upon the adequacy or inadequacy of value that it appears to me, this bargain cannot be held by Mr. *Jeyes.* To ſtate it not too high, I will ſtate, that this lady had lived to a very advanced period of life: a period, at which the Court does not ſtrain much in ſaying, the client is entitled to all the providence and care the attorney's beſt and moſt active care can throw round her. Her affairs and thoſe of her huſband had been under the care of the defendant. This Court cannot proceed upon thoſe nice and delicate conſiderations in matters of property, that would ſuggeſt to him, that as matter of moral, and therefore imperfect, obligation, ariſing from that connection, there ought to have been upon his part a tendency not to diſcover that degree of tedioufneſs and caprice, that made him weary of the connection: but if he did diſcover it in that degree, he ought to have diſſolved the relation between them. At her age, of itſelf entitling her to the protection and providence I have ſtated, ſhe had ſuffered in her health to a degree eſtabliſhed by the evidence. That that was known to the defendant is a fact too much in doubt to be aſſerted: but that her health was not very good at her years is obvious upon the whole of the evidence. Under theſe circumſtances ſhe had ſome improvidence about her affairs; or, as the defendant will ſay, an inclination to augment her comforts. The mode ſhe had adopted was ſelling a houſe for an annuity. That tranſaction went off upon ſome difficulty as to the title. If the defendant, who certainly did not mingle himſelf in that tranſaction, had bought that houſe, and taken a conveyance of it, and being her attorney in the article of ſelling the houſe had permitted her to take nothing but a bond for an annuity, I could not well permit that ſpecies of dealing. That treaty going off, another plan was thought of. I now give credit to this; that it was her real purpoſe to bring the money produced by the ſale of her ſtock to *Northampton* for the purchaſe of an annuity; though the evidence puts it in great doubt, whether ſhe did not bring it for the purpoſe of ſpending it, as ſhe wanted it. The younger *Jeyes* was employed to go to *London* to ſell out the ſtock. I do not examine, why he did not ſtate to her, that that was very imprudent:

no treaty for an annuity being entered into: nothing appearing, to ſhew, it was a prudent act to permit him to bring it home, to lie dead in a cheſt, and to be acted upon by her improvidence. It is not to be forgotten certainly, that he was obliged to point out to her how to ſpell her name, when executing the power of attorney. It is neceſſary to ſay broadly, that thoſe, who meddle with ſuch tranſactions, take upon themſelves the whole proof, that the thing is righteous. The circumſtances, that paſs upon ſuch tranſactions, may be conſiſtent with honeſt intentions: but they are ſo delicate in their nature, that parties muſt not complain of being called on to prove, they are ſo. It appears upon the account, that this money was duly rendered to her; and all the items of charge are not only unexceptionable, but very reaſonable. Her purpoſe of buying an annuity, it ſeems, had taken vaſt hold upon her mind. It was part of the moral and imperfect obligation upon *Jeyes* to contend againſt her purpoſe as much as poſſible: this however is in ſome degree excuſeable; as perſons do not chooſe to adviſe againſt the inclinations of thoſe they are adviſing. The conduct of *King* and *Gibſon*, the one endeavouring to purchaſe her property, the other perſuading her to ſell, is in a degree inconſiſtent with their imputation of imbecility. But there is a wide difference between that tranſaction and that with *Jeyes*. It is very difficult for perſons, in a moral and reaſonable view having fair expectations of property, to determine how to act. In the caſe of a perſon liable to a commiſſion of lunacy the feeling of a relation unwilling to take out a commiſſion is not to be diſapproved. The propoſition of *Gibſon* at the leaſt was to give 60*l.* a year with landed ſecurity; and alſo to give 5*l.* or 10*l.* more than any one elſe would give; and if that was the purpoſe, with a view to bring home that property into the pockets of thoſe, who had the natural claim to it, it cannot be ſaid, that tranſaction ſtands under the ſame circumſtances, as if a ſtranger was to take that to himſelf. But it is very different, when it is the caſe, not of a ſtranger, but of the attorney, acting under the confidence placed in an attorney, in an inſtance, in which the principles of this Court entitle me to ſay, he ought to have acted with more providence and attention than are required even in the caſe of parent and child.

It

Rule as to an attorney contracting with his client, or a truſtee with his *Ceſtuy que* truſt.

It has been truly ſaid, an attorney is not incapable of contracting with his client. He may for a horſe, an eſtate, *&c.* A truſtee alſo may deal with his *Ceſtuy que* truſt; but the relation muſt be in ſome way diſſolved: or, if not, the parties muſt be put ſo much at arm's length, that they agree to take the characters of purchaſer and vendor; and you muſt examine, whether all the duties of thoſe characters have been performed (*a*). In the caſe of *Fox* v. *Mackreth* it was never denied, that *Mackreth* might have purchaſed *Fox*'s eſtate. When that cauſe was in this Court, I ſaid, there never was an order more liable to objection than the order diſſolving the injunction; for independent of all the circumſtances in that cauſe this was proved upon the motion; that, giving the defendant credit for every thing he inſiſted he was entitled to, the Court overlooked the circumſtance, that he had money in his hands due to the plaintiff beyond that, for which he was ſuing at law. That caſe was decided upon theſe grounds; that though he might have diſcharged himſelf from the relation, as truſtee, he had not done ſo: on the contrary he diſtinctly ſtated, he would not conclude any thing as to the character of truſtee with regard to third perſons; carrying on the treaty as to *Page*'s eſtate by ſurveyors paid by *Fox;* and gaining intelligence at the expence of the *Ceſtuy que truſt.* An iſſue was preſſed, whether *Fox* had not received enough for the eſtate; though *Mackreth* had ſold it for more: but the queſtion was not upon the fact, whether the price paid to *Fox* was ſufficient, but upon the principle, whether under the circumſtances, if *Mackreth* had made more, he had diſentangled himſelf from that ſituation, in which every benefit made by him was to reſult to the *Ceſtuy que* truſt. The only fact was, whether he was diſentangled from that ſituation. The moment it was decided, that he was not, it did not ſignify, whether the eſtate was ſold upon fair terms between him and *Fox;* for even a benefit ariſing by accident upon the principles of this Court ſhould accrue to the plaintiff. The argument for an iſſue therefore went quite beyond the queſtion; and the caſe might have been decided upon that principle in a great meaſure free from the implication of fraud.

(*a*) See *Whichcote* v. *Lawrence, ante,* vol. 3. 740. *Campbell* v. *Walker, ante,* vol. 5. 678. *Ex parte Reynolds, ante,* vol. 5. 707. *Ex parte Hughes, Ex parte Lyon. Poſt.*

With reſpect to the caſe of the attorney, I have no difficulty in ſaying, *Jeyes* might have dealt for this annuity; but he had two ways of proceeding; which this Court muſt have held it quite incumbent upon him, dealing with this lady, to attend to. If ſhe propoſed to him to buy it, he would have done well to have ſaid to her, that *Gibſon* would give more than any one elſe; that it was his intereſt to do ſo; that he would ſecure it upon real eſtate; that it was more fit for her to deal with her relation than her attorney; and the tranſaction would have a better appearance in the world. It was natural enough, that ſhe ſhould anſwer, ſhe would not deal with *Gibſon*, but would conſider herſelf only and her own comforts, according to *Benyon's* advice to her. Then it would have been right for the defendant to have declined it. Suppoſe, ſhe had inſiſted, that he ſhould be the perſon: it would be too much for the Court to proceed upon delicacies, ſuch as theſe, and to ſay, he ſhould not permit himſelf to contract with her. Therefore I ſay, he might contract: but then he ſhould have ſaid, if he was to deal with her for this, ſhe muſt get another attorney to adviſe her as to the value: or, if ſhe would not, then out of that ſtate of circumſtances this clear duty reſults from the rule of this Court, and throws upon him the whole *onus* of the caſe; that, if he will mix with the character of attorney that of vendor, he ſhall, if the propriety of the contract comes in queſtion, manifeſt, that he has given her all that reaſonable advice againſt himſelf, that he would have given her againſt a third perſon. It is aſked, where is that rule to be found. I anſwer, in that great rule of the Court, that he, who bargains in matter of advantage with a perſon placing confidence in him is bound to ſhew, that a reaſonable uſe has been made of that confidence; a rule, applying to truſtees, attorneys, or any one elſe.

General rule, that he, who bargains in matter of advantage with a perſon placing confidence in him is bound to ſhew, that a reaſonable uſe has been made of that confidence.

If that is the rule, ſee, how this tranſaction proceeds. Firſt, with regard to the ſecurity. This lady, at the age of ſeventy-one, in poſſeſſion of ſtock, which had produced this money, and which therefore might have been in a certain way made a ſecurity *pro tanto* for the payment of the annuity, deals with a perſon ſtated to be in very good circumſtances, but of the age of eighty, with a large family; among whom that property will probably be parcelled out by diſtribution. He propoſes a bond as a ſecurity for her daily bread. Is that what a Court of juſtice can approve.

it would have been his duty, adviſing her as againſt a third perſon, to have ſaid, that in the natural courſe of things that perſon of the age of eighty, nine or ten years older than herſelf, might die in her life; and ſhe, ſurviving perhaps ſeveral years, would have to go, not to any ſpecific fund, the ſtock or the money, not even to *Gibſon*'s public houſes, to which as a ſecurity ſhe had objected, but to get adminiſtration as a creditor, or to follow the repreſentatives. It was his duty to ſay that as againſt himſelf. But in other reſpects he did not exert reaſonable diligence; for there was an abſolute duty upon him to have made the moſt, not only of the circumſtance of age, but alſo of the actual ſtate, in which ſhe was. If he had been dealing to the beſt advantage with a ſtranger, it would have been his duty to make accurate inquiries as to her ſtate of health; and when propoſing the purchaſe to a public Office, but more eſpecially to individuals, he ſhould have gone on behalf of his client with all the information, that would have given her any advantage. If he had made inquiry of thoſe living with her, he muſt have learned the probability, that there was ſomething more than a bilious diſorder, and of a kind, that might moſt materially affect the conſideration. But the only inquiry was that, which the circulation of the Office paper produced. Is that reaſonable and due diligence in ſuch a caſe? It appears to me a better bargain in the general caſe to have taken the lower terms from the Office than theſe upon perſonal ſecurity; for, in whatever way their liability is formed, there is a regularity in their tranſactions, which is the foundation of their credit, and gives a value to their ſecurity, which that of individuals will not fetch in the market; if the market price is to determine. The opinions in evidence as to the value are worth nothing in this ſenſe; that they only calculate upon mere age; and take all lives of the ſame age to be of equal value. I will not ſay, whether upon the difference in the evidence as to the value it is groſsly inadequate within Lord *Thurlow*'s meaning: but it was the duty of the attorney of this lady to get that 14*l.* a year for her, if he could; and it was negligence not to make that inquiry, which any man buying an annuity would have made. If the witneſſes agreed, that 50*l.* was enough, that would not be concluſive in favour of the defendant; for the ſubſtance of their evidence is, that the life was taken to be good; and the defendant would have failed in this article; that he had not made advantage enough in the article of her health; as to which he muſt have been informed. In that reſpect alſo there is a failure of due diligence. By that negligence a ſtranger, if the tranſaction had been with a ſtranger, would have profited; and it follows in this Court, that, when you can characterize the conduct as negligence towards a ſtranger, by which he obtains an advantage, the attorney becoming purchaſer ſhall not hold that advantage, gained by his negligence. That is the principle, upon which I decide this cauſe as to *Jeyes* the younger; and I am ſatisfied by this evidence upon the queſtion, whether the defendant is affected by the conduct of *Jeyes* the younger, that there is no diſtinction between them; and the weight of evidence is againſt the alleged diſſolution of partnerſhip. It does appear, that the defendant was unwilling to contract for this annuity. That circumſtance diſconnects the tranſaction of *December* from the ſale of the ſtock in *November*; and gets rid of a great deal of imputation.

As to the relief, it cannot go quite to the extent of the prayer. It muſt be only a decree, that the 400*l.* muſt be repaid with intereſt. If I am to conjecture, I do not go the length of ſaying, this money was brought from *London* for the purpoſe of the ſale of this annuity. It may be ſo: but if it is poſſible it may not be ſo, I muſt conſider it as converted into an annuity in *December* 1798. I cannot therefore charge the defendant to the extent of making him replace the ſtock; which would make ſome difference. The principle, upon which I make the decree, carries the coſts with it.

July 10.

WRIGHT *v.* MAYER.

Motion to compel an attorney to produce papers of his client refuſed with coſts.

MR. *Mansfield*, Mr. *Richards*, and Mr. *Stanley* for the plaintiff in a bill of diſcovery moved, that an attorney may produce certain caſes and opinions of Counſel and other papers in his poſſeſſion, belonging to his client.

Mr. Lloyd and Mr. Pemberton contrà—This motion, is perfectly new. It is not an application, that the party may produce theſe papers; but that theſe perſons, confidential agents, may produce theſe papers, delivered to them as attorneys; and ſtate confidential communications. They have anſwered all collateral facts: but they refuſe without the direction of the Court to produce any papers held by them as attorneys, or to anſwer the interrogatories as to any thing communicated to them in confidence. *The King* v. *Dixon* (*a*) is deciſive againſt this application. *Wilſon* v. *Raſtall* (*b*) turned upon the delivery being in confidence as a friend. The privilege is that of the client, not the attorney.

A party might be compelled to produce papers connected with the relief.

Lord CHANCELLOR—This motion is perfectly new. It does not follow, that it can ſucceed, even if the party could be compelled to produce theſe papers; as I ſhould think, without prejudice to argument upon it, ſhe could. I recollect many caſes, in which as part of the conduct, upon which the relief was to be aſked, it was alleged, that the defendant had taken opinions, and they were in his poſſeſſion; and that was charged as a fact, connected with other circumſtances of conduct, from which an inference could be drawn as to the relief to be given. In many caſes the defendant may deny, that the papers, the production of which is called for by the bill, (in this inſtance papers ſhewing, ſhe meant to evade this covenant,) are in her cuſtody or power: but they are in her power, if in the cuſtody of her attorney. I am not ſure however, that the miſchief is not leſs than that, which would be the conſequence of a practice of drawing out of the hands of attorneys papers, which are in their hands always in confidence. It is ſaid in this caſe, you want only to produce the caſes and opinions. It is not quite clear, whether that is not more miſchievous than addreſſing to them all theſe interrogatories; for the motives, and the purpoſes, for which they are put into the hands of the attorney, connected with the fact, that the opinions were taken, might make out, that the party did not mean to evade the covenant: but that would introduce a right to croſs examine as to facts certainly communicated in confidence. I am alſo ſtruck with its being after publication; though honeſtly accounted for. But upon the other principle; that it is the privilege of the client and the public, and that in this Court another mode is open; if it is not the fault of the party, I am of opinion, it would be too

(*a*) 3 *Bur.* 1687.

(*b*) 4 *Term Rep. B. R.* 753.

dangerous

1801.

Wright v. Mayer.

No *Subpœna duces tecum* upon an attorney to produce papers of his client. It has been ſometimes ſeen in a criminal caſe; but is not to be followed.

dangerous to call fot papers put into the hands of an attorney confidentially. I never heard at law of a *Subpœna duces tecum* upon an attorney, to produce the papers of his client. I remember in a caſe of forgery at *Durham* a man ſerved with a *Subpœna* to produce a forged deed. It has been ſometimes ſeen in a criminal caſe: but that is not a precedent to be followed.

The motion was refuſed with coſts.

July 10.

CHING v. CHING.

An award cannot be diſturbed for miſtake upon a queſtion of Law referred.

UNDER a general reference of all matters in diſpute the arbitrator, a clergyman, had made an award, deciding all the queſtions.

Mr. *Richards* moved to rectify an error in Law; alleging no other ground, but that the arbitrator had made a wrong deciſion upon a queſtion of Law.

Lord CHANCELLOR—If a queſtion of Law is referred to an arbitrator, he muſt decide upon it; and though he decides wrong, you cannot help it. In a caſe before Lord *Roſslyn*, Mr. *Mansfield* and I endeavoured to open an award on the ground of miſtake of the arbitrator; the queſtion referred being as to the veſting of a legacy: but it was held, it would not do.

Motion refuſed (*a*).

(*a*) *Price* v. *Williams*, *ante*, vol. 1. 365. 3 *Bro. C. C.* 163. *Knox* v. *Simmonds*, *ante*, vol. 1. 369. *Morgan* v. *Mather*, *Dick* v. *Milligan*, *ante*, vol. 2. 15. 23. *Emery* v. *Waſe*, *ante*, vol. 5. 846. *Pennyman* v. *Burton*. *Poſt*.

COCK *v.* RAVIE.

July 10.

A writ of *Ne exeat regno* refuſed upon an undertaking for an indemnity. To obtain it there muſt be an equitable demand in the nature of a debt actually due.

The plaintiff moved for a writ of *Ne exeat regno* againſt the defendant *Ravie* under the following circumſtances, proved by affidavit.

Ravie, living at *Birmingham*, was owner of goods, ſhipped on board the *Jane*, bound from *Hull* to *Embden*; which ſailed from *Hull*; was captured by a King's ſhip; and was libelled in the Court of Admiralty. *Ravie* propoſing to give ſecurity applied to the plaintiff and the other defendant *Smith* to become ſureties; offering to give them an indemnity. They accordingly became his ſureties to the amount of 12,000 *l.* They applied for the indemnity; and by a letter, dated the 2d of *May*, he propoſes to give an indemnity either by purchaſing ſtock and lodging a ſecurity with them, or by leaving the writings of freehold property, ſtated to be ſubject to a mortgage. Another letter, dated the 9th of *May*, written by his partner, likewiſe ſpeaks of the ſecurity the plaintiff had entered into, and propoſes, that *Ravie*'s brother at *Hamburgh* ſhall give ſecurity; but in the mean time propoſes to ſend the deeds. Another letter of the 19th of *May* ſays generally, that he will furniſh the deeds to his attorney for the purpoſe of making the ſecurity.

The affidavit then ſtated, that he is now about to leave the kingdom to go to *Hamburgh*.

Mr. Romilly and Mr. Cooke in ſupport of the motion—There is no caſe exactly like this: but the ground of theſe caſes is, that there is an equitable demand. This plaintiff has unqueſtionably a certain demand in Equity. It does not reſt merely upon their being ſureties; though that would be ſufficient: but there is an expreſs undertaking to depoſit theſe deeds; which would give an equitable mortgage. The eſtate being in mortgage, he could not give the legal eſtate. The only caſe, that has gone beyond a poſitive debt, is, where there are unliquidated accounts, and the plaintiff ſtates, that he believes, the balance will be in his favour.

Lord Chancellor—Has it not always been a money demand? Do you recollect an inſtance of the writ being applied to this ſort of caſe?

For the motion—*Ruſſell* v. *Aſby* (*a*). The performance of an undertaking is as much a duty; giving a cauſe of ſuit: *Prac. Reg.* 289. The caſe of Alimony is analogous. In *Parker* v. *Appleton* (*b*) the bill, though not ſtated very accurately, muſt have been for a ſpecific performance.

Lord Chancellor—*Ruſſell v. Aſby* was a clear money demand. If, wherever the plaintiff has a cauſe of ſuit, that is taken to be a cauſe of equitable ſuit, and in that caſe merely you may have the writ, there is no diſtinction. In the caſe of Alimony there is the decree for Alimony; and therefore it is a debt by law due to the wife. In what ſum am I to mark this writ?

For the motion—In the value of the indemnity; which is ſtated to be 4,000 *l.* In *Ruſſell* v. *Aſby* there was no contract between the plaintiff and the defendant: the executor in truth owed the money (*c*).

Lord Chancellor—I remember a bill filed to make the principal in a bond pay the debt. The party was going to *America* upon the 1ſt of *June*; and the bond would have been due on the 1ſt of *July*. That was very ſtrong: yet Lord *Thurlow* refuſed the writ. Suppoſe, the next of kin file a bill againſt the adminiſtrator; praying this writ: though the whole property may be in the dominion of the adminiſtrator, you never mark the writ for more than has been actually converted; which ſhews it to be in the nature of a bill for a debt actually due. *Parker* v. *Appleton* ſeems to amount to no more than that they were partners in a joint adventure; and it was part of the project, that, when ſold, the produce ſhould be inveſted in *American* ſtock. Then the defendant was truſtee of one moiety for the plaintiff; and the writ was marked for that. Suppoſe, this was an agreement for ſale of an eſtate; and the plaintiff had advanced 500 *l.*, part of the purchaſe money: could he have the writ marked for the value of the eſtate? I am ſorry for it: but I cannot grant the writ.

Motion refuſed.

(*a*) *Ante*, vol. 5. 96. (*b*) 3 *Bro. C. C.* 427. (*c*) *Chambers* v. *Minchen*. *Poſt.*

——— *v.* GWILLIM.

July 11.

MR. *Hart* moved, that the anſwer of Sir *Henry Gwillim* may be taken without oath; and that the Six Clerk may be ordered to receive it without his ſignature; on the ground, that the defendant (*a*) in the hurry of going abroad had forgot to ſign his anſwer.

Order, that the Six Clerk may receive the anſwer without ſignature: the defendant having gone abroad, and forgot to ſign it: the motion being conſented to.

The motion was conſented; and the order was made (*b*).

(*a*) Sir *Henry Gwillim* was appointed one of the Judges of the Supreme Court at *Bengal*.

(*b*) ——— v. *Lake*, *ante*, 171.

Ex parte MATTHEWS.

July 11.

THE petitioner, of *Liverpool*, kept a banking account with *Caldwell* and Co. of *Liverpool*; and in the latter end of the year 1792 being indebted to *Garland* and Co. of *Pool* 1,358*l.* 2*s.* 2*d.* for corn ſold to him by them for the purpoſe of diſcharging that debt directed *Caldwell* and Co. to give an order upon *Burton*, *Forbes*, and *Gregory*, in *London*, upon whom they drew, and with whom they were engaged in partnerſhip, to accept a bill to that amount drawn by *Garland* and Co. A bill was drawn accordingly by *Garland* and Co., dated the 1ſt of *January* 1793, by the direction of the petitioner; and by the direction of *Caldwell* and Co. was accepted by *Burton*, *Forbes*, and *Gregory*. In *March* 1793, before the bill became due, *Burton*, *Forbes*, and *Gregory*, became bankrupt; and alſo *Caldwell* and Co. The bill was not taken up. *Caldwell* and Co. were indebted to the petitioner to an amount above 2,000*l.* *Garland* and Co. proved the amount of the bill under the Commiſſion againſt *Burton*, *Forbes*, and *Gregory*. Afterwards in 1796 upon an inquiry previous to a dividend, as to what *Garland* and Co. had received upon their

A. to diſcharge a debt due from him to *B.*, procures his banker *C.* to direct his correſpondent and partner *D.* to accept a bill drawn by *B.* Before the bill was due, *C.* and *D.* became bankrupt; *C.* being indebted to *A.* more than the amount of the bill. *B* proved againſt the eſtate of *D.*; but afterwards received the whole from *A.* *A.* not having proved againſt the eſtate of *C.* in reſpect of the bill is entitled to ſtand in the place of *B.* againſt the eſtate of *D.*; whoſe proof having been expunged was reinſtated for the benefit of *A.*

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ſecurities ſince the proof, they ſtated, that ſince the proof they had received the whole debt from the petitioner; upon which the proof was expunged.

Under theſe circumſtances the petition alleging, that the petitioner was deprived of receiving a dividend through *Garland* and Co. prayed, that the proof might be reinſtated; and that an order ſhould be made for a dividend of 2*s.* 6*d.* in the pound upon the debt of 1,358*l.* 2*s.* 2*d.*, to put him upon a footing with the other creditors.

Mr. Pemberton in ſupport of the petition.—Mr. Romilly for the aſſignees.

The petition ſtood for judgment.

Lord CHANCELLOR—The queſtion upon this petition ſeems to be, whether under the circumſtances the petitioner paying that demand of *Garland* and Co., in reſpect of which they had drawn upon *Burton*, *Forbes*, and *Gregory*, which bill they had accepted, and, in reſpect of which *Garland* and Co. proved againſt their eſtate, had a right to ſay, *Garland* and Co. being paid by his money inſtead of the ſecurity he gave them ſhould ſtand as truſtees of the proof for his benefit; and upon the beſt conſideration I can give it I think, he has that right. It is neceſſary to conſider it as to the ſituation of the petitioner with regard to *Caldwell* and Co., of *Caldwell* and Co. with regard to *Burton*, *Forbes*, and *Gregory*, and of *Burton*, *Forbes*, and *Gregory*, with regard to *Garland* and Co. The petitioner, being a creditor of *Caldwell* and Co. procures them to furniſh *Garland* and Co. with the means of drawing upon *Burton*, *Forbes*, and *Gregory*. They drew accordingly; and the moment *Burton*, *Forbes*, and *Gregory*, had given their acceptance to *Garland* and Co. the neceſſary effect was, that *Burton*, *Forbes*, and *Gregory*, in account againſt *Caldwell* and Co. had a right to conſider themſelves as having a demand againſt *Caldwell* and Co. to the amount of their acceptance; and the effect of that was, that *Caldwell* and Co. had alſo a right to conſider themſelves debtors to the petitioner leſs than what they owed him by the amount of this ſum; for in effect they were bound to indemnify *Burton*, *Forbes*, and *Gregory* to the extent of their acceptance.

Therefore

Ex parte MATTHEWS.

Therefore, if the petitioner in proving againſt *Caldwell* and Co. has carried to his debit the amount of this bill, then the petition is right. If on the other hand he has proved the whole debt againſt *Caldwell* and Co., not deducting that ſum, then he will not have a right to ſtand in their ſituation againſt the eſtate of *Burton*, *Forbes*, and *Gregory*.

Upon inquiry it appeared, that the petitioner had not proved in reſpect of this bill againſt *Caldwell* and Co.; and the Order was made according to the prayer of the petition.

ANONYMOUS.

July 11. 13.

Upon a motion, that a Receiver may be at liberty to defend an ejectment, the parties intereſted being adult and conſenting, a reference was made, whether it was for their benefit.

MR. *Owen* moved, that the Receiver ſhould be at liberty to defend an ejectment; and to charge the expence in his accounts.

The Lord CHANCELLOR expreſſed doubt upon it; and aſked, why this perſon would not come, deſiring to be examined *pro intereſſe ſuo*.

For the motion—Except in the caſe of a ſequeſtration that has been done only in one inſtance, *Angel* v. *Smith*; where, infants being concerned, the Lord Chancellor took that courſe: but it was thought very novel. The common courſe is to refer it to the Maſter; but not, where it is clear. In this caſe the eſtate is deviſed to truſtees, upon truſt to receive the rents and profits, and to pay to a nephew 120*l.* a year, until he marries with conſent of the truſtees; then to him for life; with remainders to the iſſue of the marriage; and if he ſhould marry without conſent, or die without iſſue, then to the right heirs of the teſtator: this perſon being the heir. A decree was made for carrying the will into execution; and a direction was given to take an account of the premiſes, of which he was ſeiſed. In 1794 the Report was made; ſtating, that the teſtator died ſeiſed of the very tenement, which is

1801. ANONYMOUS. is the ſubject of this motion. The Receiver has been in poſſeſſion from 1793: the poſſeſſion of the Court by its Officer. If he defends any premiſes, of which he is not in poſſeſſion as Receiver, this Order will not protect him. Notice of trial is given for the enſuing Aſſizes at *Hereford*. All the parties really intereſted are adult; and conſent.

Mr. *Lloyd* (*Amicus Curiæ*) ſaid, the underſtanding was, that, where there was a Receiver, no perſon would be permitted to bring an ejectment, or take any other proceeding, without the leave of the Court; whoever did would be committed.

Upon a ſequeſtration a mortgagee muſt come to be examined *pro intereſſe ſuo.*

Lord CHANCELLOR ſaid, he could not diſtinguiſh the caſe of a Receiver from that of a ſequeſtration: why in the latter caſe a mortgagee, for inſtance, with a clear title to take poſſeſſion muſt come to be examined *pro intereſſe ſuo*, and not in the other.

July 13. Lord CHANCELLOR ſaid, he would give the Receiver leave to defend this ejectment; but would reſerve the conſideration of the coſts till after the trial: not approving a Receiver coming juſt before the trial, when it is impoſſible to have a reference to the Maſter, whether it is for the benefit of the parties, that he ſhould be at liberty to defend the ejectment.

Mr. *Owen* ſaying, they could get the Report in time, and offering to go before the Maſter, the order was made accordingly.

July 11. 13.

ASTON *v.* LORD EXETER.

Where the bill ſeeks relief as well as diſcovery, the Court will not upon motion aid the plaintiff in proceeding at Law without the authority and control of the Court: any ſuch proceeding muſt be under a decree. Therefore in ſuch a caſe a motion, that the defendant ſhould produce deeds, &c. at the trial of an ejectment was refuſed.

MR. *Benyon* for the plaintiff moved, that the defendant may be ordered to produce and leave with his clerk in Court ſeveral deeds, dated in 1690, 1701, and 1702, ſet forth in the anſwers, and all other deeds relating to the premiſes, in aid of an ejectment brought; and that copies may be produced at the trial; if the originals ſhould not be produced. The bill prayed a diſcovery and a Commiſſion to aſcertain boundaries.

The Lord CHANCELLOR expreſſing doubt upon this motion,

Mr. *Bell* (*Amicus Curiæ*) mentioned *Worſley* v. *Watſon*; in which the bill ſtated a ſettlement, and proceedings at Law; and deſired a diſcovery of that deed. The anſwer denied the pedigree; but admitted, they had the ſettlement. A motion was made, that they ſhould produce that deed. Lord *Roſslyn* made the order; and the cauſe was tried. That was decided upon the general principle; that if the party entered into a diſcovery of his title, he would in all probability be forced to go to Law; and it anſwered the purpoſes of juſtice. If he went to Law without that deed, he muſt have been nonſuited.

Lord CHANCELLOR inclined againſt the motion; alluding to the caſe of *Lady Shafteſbury* v. *Arrowſmith* (a); deciding, that the party was only entitled to the production of the deed, under which he claimed; diſtinguiſhing between a mere bill of diſcovery in aid of an ejectment and a bill alſo praying relief in this way, followed up by a motion for a production in aid of an ejectment, not under the control of the Court; proceeding in Equity and at Law for the ſame thing.

July 13.

Lord CHANCELLOR—I have looked into the order in the caſe of *Worſley* v. *Watſon*, the 20th of *November* 1800. The bill was brought againſt four defendants; ſtating, that *Robert Frank* was ſeiſed in fee; and by indentures of leaſe and releaſe, dated in 1734, he conveyed two acres; ſtating the boundaries, and the limitations to the uſe of *Elizabeth Atkinſon* and the iſſue of her body lawfully to be begotten; and upon failure of ſuch iſſue to *William Atkinſon*, his heirs and aſſigns for ever. The bill alleged, that this deed was then in the poſſeſſion of the defendant *Mary Watſon*; that *Elizabeth Atkinſon* took poſſeſſion; and continued in poſſeſſion till her death, except of ſuch part, of which poſſeſſion was taken by two other defendants; under whom *Brown*, another defendant,

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(a) *Ante*, vol. 4. 66.

fendant, claimed by an under-agreement. *Elizabeth Atkinſon* married *Shawe*; and the premiſes were formed into one field. After the death of her huſband ſhe entered into an agreement to ſell two acres; which included a conſiderable part of the premiſes in the indenture. She died without iſſue in 1799. *William Atkinſon* the younger died in her lifetime; and the plaintiff traced his pedigree from him. The bill then ſtated, that *Mary Watſon* under pretence of the will of *Elizabeth Shawe* poſſeſſed herſelf of the deed of 1734 and of other deeds, papers, and writings, relating to the premiſes, that there was a great quantity of lime-ſtone on the premiſes; and three of the defendants claimed under contracts made with *Mary Watſon* to take lime; that the plaintiff was deſirous and intended to bring actions of ejectment; that he could not ſafely without the deed of 1734 and other title deeds; and the bill ſuggeſted irreparable injury, before the actions could be brought, by the defendants taking the lime-ſtone. The bill then ſtated application to the defendant *Watſon* for the deeds, and to the other defendants to deſiſt from taking the limeſtone and committing waſte; and contained allegations in ſupport of the general ſtatement; particularly, that the defendant inſiſted, that a Recovery was ſuffered; and contending, that could not be upon the effect of that limitation in the deed. The prayer was, that ſhe might produce and leave with her Clerk in Court the deed of 1734 and all other deeds, papers, and writings, relating to the premiſes; and that the ſame may be produced at the trial of ſuch action or actions as the plaintiff ſhould be adviſed to inſtitute; and if it ſhall appear upon the trial, that the plaintiff is entitled, then that the deeds, papers, *&c.* may be delivered up; and in the mean time for an injunction to reſtrain the defendants from getting lime-ſtone or committing waſte; the plaintiff waiving all forfeitures; and for general relief.

This bill praying a delivery of the deeds and alſo general relief is upon the authority of Lord *Hardwicke* in *Dormer* v. *Forteſcue* (*a*) a bill, not of diſcovery, but of relief. Some caſes intimate, that if the bill was merely for the delivery of deeds, it might not be conſidered a bill for relief: I do not ſee, why; for there muſt be ſome decree or decretal order, directing that delivery.

(*a*) 2 *Atk.* 282. 3 *Atk.* 124.

The anſwer claimed title under this alleged Recovery; which clearly could not furniſh a queſtion to be tried at Law; and it inſiſted farther upon this fact; that the title deeds had got into the hands of an attorney; to enable him to carry into effect the agreements with the perſons claiming the lime-ſtone under the defendant *Mary Watſon;* and he happening alſo to be the attorney for the perſons claiming againſt her had got the information in her ſervice; which he made uſe of for the perſons claiming againſt her; and the anſwer ſuggeſted a doubt, whether he had returned all the title deeds. After the anſwer an ejectment was brought; and then the motion was made; that the defendant *Mary Watſon* may be ordered to leave in the hands of her clerk in Court for the plaintiff's inſpection the deed of 1734 and all other deeds, papers, and writings, ſet forth in the ſchedule to her anſwer, and admitted to be in her cuſtody; that the plaintiff may be at liberty to take copies; and that the deeds, *&c.* may be produced at the trial of the ejectment, brought by the plaintiff (without any control of the Court). The order was made, that *Mary Watſon* do leave with her Clerk in Court for the plaintiff's inſpection the deed of 1734 and all other deeds, papers, *&c.* according to the motion: the plaintiff undertaking to return them after the trial.

With reſpect to this Order, firſt, I do not find, what the deeds were, deſcribed in the ſchedule. But this motion, if the ſchedule contained any deeds, under which the defendant ſought to make title againſt the deed of 1734, was granted directly in oppoſition to the decree of Lord *Thurlow* in *Burton* v. *Neville* (*a*) and the order of Lord *Roſslyn* in Lady *Shafteſbury*'s caſe. My next objection to this Order is, that, though the motion for the diſcovery and production of the deeds might be right, becauſe thoſe deeds referred to in the anſwer might be conſidered as part of the anſwer, the difficulty is, whether there is any caſe, in which the bill being filed, not for diſcovery, but for relief, the Court acting upon motion orders the production in an ejectment brought after filing the bill, and before the cauſe is heard; and the Court not having the opportunity of directing what is proper; if any proceeding at Law is neceſſary; and this bill ſeems preciſely that of *Dormer* v. *Forteſcue*; in which both Lord *Talbot* and Lord *Hardwicke*

(*a*) Cited *ante*, vol. 4. 67.

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wicke thought, all the relief might be given, which went to delivery up of deeds and an account of the rents, *&c.* In this caſe the Court ſees, it is competent to decide on the queſtion, as matmatter of Law, with or without the aſſiſtance of a caſe ſent to Law. But if it is the courſe of the Court to take care both for the plaintiff and the defendant, that there ſhall be no ſurpriſe upon juſtice, was there ever a caſe requiring more ſtrongly a production on both ſides, before the matter goes to Law; when it is ſtated, that the plaintiff had got from the attorney of the defendant this information with regard to her own title, and this doubt was ſuggeſted in the anſwer, whether he ever returned all the deeds. The authority of that Order I queſtion; becauſe I cannot find any caſe to that extent; and becauſe it goes a length, to which Lord *Roſslyn* refuſed to act in the caſe of Lady *Shafteſbury*, Lord *Thurlow* in *Burton* v. *Neville*, and the Court of Exchequer in a caſe cited (*a*) in that of Lady *Shafteſbury*. My doubts therefore as to granting theſe motions remain.

As to the motion in this particular caſe, there are other reaſons againſt it. This is not a motion for the purpoſe of having deeds, a diſcovery of which is ſought by the bill, produced in the Maſter's office; and where the Order for the production is made upon the ground, that it is only to complete the anſwer: but it is in a caſe, where there is a bill and an anſwer, a motion to produce them to the intent, that they may be made evidence upon an ejectment brought, not under the view or control of the Court. The caſe is a limitation of various eſtates to various uſes; and among them the plaintiff claiming by deſcent, finds a title, that was never barred by intermediate acts. A term of ninety-nine years was created in 1690; and was therefore run out, before the bill was filed. That term, the object of which was to raiſe portions for younger children, was ſold for 2,000*l.* It appears by the anſwer of Lord *Exeter*, that a fine was levied; and under that the anceſtor of Lady *Exeter* ſuppoſed, he had become entitled to an eſtate in fee; and all the other uſes were barred. The plaintiff contends, that the fine gave no title; and therefore claims the poſſeſſion of this land from Lord *Exeter* in conſequence of the effluxion of time, during which the title ſubſiſted. They ſtate, that *Vernon* being ſeiſed in fee of a great number of premiſes has

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(*a*) Cited *ante*, vol. 4. 69.

ſo deſtroyed the boundaries, that it is impoſſible to aſcertain them without the aſſiſtance of a Court of Equity. Their bill is upon this ground; that they want diſcovery, to decide, whether there muſt not be a Commiſſion to aſcertain the boundaries. Certainly it is a duty upon the tenant to keep the boundaries; and this Court will aid the reverſioner to diſtinguiſh them; and even will give him as much land, if they cannot be diſtinguiſhed (*a*). Lord *Exeter*, being only ſeiſed of the freehold in right of his wife, from whom he was divorced, is made the ſole defendant. He ſtates, that he is in poſſeſſion; that the family, taking themſelves to be entitled, have ſold to, and exchanged with, other perſons: ſo that the premiſes are partly in his poſſeſſion, partly in that of others. Under theſe circumſtances they bring an ejectment; and ſay, it is ready for trial at *Worceſter*; and upon motion they deſire, that that ejectment, not under the control or view of the Court, and in a caſe, in which the bill aſſerts, that the Sheriff cannot deliver poſſeſſion, if the plaintiffs recover, the deed of 1690 may be produced, and all the ſubſequent deeds, and that they may be carried down to *Worceſter*; and this under an Order of this Court; and where the defendant does not repreſent the inheritance of the eſtate. I doubt it; firſt, upon what I have ſaid; 2dly, becauſe this caſe under the circumſtances differs totally from that, in which Lord *Roſslyn* made the Order I have ſtated.

Duty of the tenant to keep the boundaries; and the Court will aid the reverſioner to diſtinguiſh them; and, if they cannot be diſtinguiſhed, will give him as much land.

Motion refuſed (*b*).

(*a*) *The Duke of Leeds* v. *The Earl of Strafford, ante*, vol. 4. 180.

(*b*) See the next caſe.

HYLTON *v.* MORGAN.

July 11. 13.

MR. *Thomſon for the plaintiff* moved upon the anſwer for an injunction to reſtrain the defendant from ſetting up any outſtanding term by way of defence to the ejectment brought by the plaintiff, or any other ejectment he may be adviſed to bring for recovery of the premiſes. Notice of trial had been given.

Where the bill ſeeks relief as well as diſcovery, the Court will not upon motion aid the plaintiff in proceeding at Law without the authority and control of the Court: any ſuch proceeding muſt be under the authority and control of the Court. Therefore in ſuch a caſe the Court would not on motion order, that an outſtanding term ſhould not be ſet up by the defendant againſt an ejectment brought by the plaintiff.

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Lord CHANCELLOR—The doubt I have is, whether the regular courſe of the practice of this Court is to be broken in upon; and that, which would be done all at once under a decretal Order, is to be made the ſubject of ſeveral motions. In proceedings under the control of this Court a production is ordered on both ſides; and from that production a benefit may ariſe to the party, with whom you are contending at Law; as in the laſt motion, there might be papers in the poſſeſſion of the party applying, from which the identity of the premiſes would appear. This is quite new practice.

Mr. *Thomſon in ſupport of the motion* ſaid, there was no ſuch queſtion in this caſe; which was merely a queſtion of title. The bill is filed on the ground of illegitimacy. This application is not for any thing, that can prejudice the defendant's title, or aid the plaintiff's; but is merely to have a fair trial of the plaintiff's right. The whole object of the bill is reducible to ſetting aſide the outſtanding term, which the defendant admits, in order to have a fair trial. That may be done in any ſtage of the cauſe.

Lord CHANCELLOR—This happens to be a clear caſe: but in many inſtances there muſt be vaſt inquiry and expence; and where the defendant has a right to be protected by the decree, is it not bad practice to let a party coming for relief, with regard to which he is to proceed at Law, proceed at Law, before he entitles himſelf to that relief? It is deciding the whole Equity of the caſe before the decree. Is the plaintiff to pick out his own mode of proceeding at Law: or, is not the principle of ſuch a bill, that the Court directs the mode of proceeding at Law under a decree? In general till the decree the Court muſt ſuppoſe the parties to be litigating upon queſtionable rights. Put the caſe, that at the hearing the Court may find it neceſſary to direct an iſſue; or, if the trial ſhould be by ejectment, to give ſpecial directions as to admiſſions, &c. Can it be right, that previouſly to the decree an ejectment is to go on at the hazard of proceeding in the very manner the Court would have prohibited. I will not act in particular caſes againſt the practice. There are two ways of proceeding. You may get a diſcovery in aid of an ejectment: but if you will have equitable relief to aid the trial of your title at Law, you muſt have that relief upon a decretal order prior to the trial at Law.

Suppoſe, in the caſe in *Atkins* (a) upon this head of Equity, that, when the decree was made, and a production by both parties ordered, the perſon preſumed to be heir at law turned out not to be heir from papers in his own poſſeſſion: would not the whole expence of the ejectment be thrown away? It will be found, that what has been the conſtant practice of the Court is founded in a great deal of wiſdom, when it is examined. The queſtion now is, whether I ſhould not ſtay the ejectment till the decree; and then give ſuch directions for a trial at Law as may be neceſſary.

Mr. *Lloyd* (*Amicus Curiæ*) ſaid, that certainly was the practice; and this ſort of relief never uſed to be given upon a motion prior to the decree.

July 13.

Lord CHANCELLOR—This caſe is ſimilar to the laſt (b). The bill is filed for an account of all ſums of money received by the defendant or for her uſe on account of the rents and profits from the death of *William Morgan*. It ſtates the will, made in 1788; and the death of the teſtator; and the poſſeſſion ſince. The motion is for an injunction to reſtrain the defendant from ſetting up any outſtanding term by way of defence to the ejectment brought by the plaintiff, or any other ejectment he may be adviſed to bring for recovery of the premiſes. This is alſo therefore a bill for relief; which relief muſt be grounded upon ſome proceeding at Law. The party without the control of the Court chooſes, what his proceeding ſhall be; and then he will probably drop the bill; and it will have the effect of a mere bill of diſcovery. If the party chooſes to file a bill of diſcovery, be it ſo: but if he chooſes to file a bill for relief, and take his chance of obtaining it, it is very difficult to make out, that the Court is to aid him in any ſtep, meaning to drop the relief, and to make it a mere bill of diſcovery; but not appriſing the Court of that purpoſe. In this inſtance it is a queſtion of legitimacy. The fact is, he was a Fellow of a College; and it is ſtated, that he married; and his marriage was kept ſecret, till he removed to a College Living; and that there is no pretence for illegitimacy. The plaintiff is a near relation of the family. If as to the pedigree, as to which, I apprehend, a production would be ordered, it ſhould happen, that any thing in the poſſeſſion of this relation of the family confirmed the allegation, that this ſon was legitimate, is it the ſame thing to ſend the party to try the queſtion without any of thoſe proviſions, which would be ſecured upon an iſſue, ordering a production on both ſides, *&c.*? The very thing he is doing is part of the relief; and he takes his relief piece-meal, part by motion, part by decree. The only caſes like it are *Bettiſon* v. *Farringdon* (*a*), and *The Earl of Suffolk* v. *Howard* (*b*). It is impoſſible to follow that laſt caſe in ſome points. The defendant made the deeds part of his anſwer; and upon that the Court ſeems to have ordered the production, and upon principle: but they did that, I apprehend, upon the ground, that the anſwer offered it; and therefore it is not within *Burton* v. *Neville* (*c*) and Lady *Shafteſbury*'s caſe (*d*). Then as to the annuity, the Court ſeems to have thought, there was ſomething very pityable in it; and the cauſe does not go on, till a decree can be regularly obtained: but the arrears are ordered to be paid in that ſtage. It is impoſſible to follow ſo irregular a proceeding as that. In *Bettiſon* v. *Farringdon*, whether the bill was for diſcovery or relief, the anſwer put an end to all poſſible claim; referring to a Recovery; and the anſwer tendering to the Court a caſe, upon which they could determine, that the defendant's legal title did not require trying, the Court upon motion gave leave to look into that. But the object in both thoſe caſes was, not to aid a proceeding at Law brought without the view of the Court, but to prevent a proceeding at Law upon the defendant's inſiſting, it was unneceſſary. That is very different. A diſcovery and production in the Maſter's office with that view is very different from a diſcovery and production upon a trial, not directed by the Court, and not under its control. So is a diſcovery in the Maſter's office with a view to ſee, what in the courſe of the cauſe, retained in equity, is fit to be done.

(a) 2 *Atk.* 282. 3 *Atk.* 124.

(b) *Aſton* v. *Lord Exeter.*

I am of opinion therefore, that it is not fit to aid theſe experiments at law, after a bill filed, without the authority of the Court,

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(*a*) 3 *P. Will.* 363. (*b*) 2 *P. Will.* 176. (*c*) Cited, *ante*, vol. 4. 67.
(*d*) *Lady Shafteſbury* v. *Arrowſmith*, *ante*, vol. 4. 66.

and not under its view. Setting aſide this outſtanding term is relief, and relief enough for you afterwards to go on for an account of rents and profits.

The motion ſtood over, to give farther opportunity of looking into it; and it was not brought on again.

DANIELL *v.* DANIELL.

Rolls.
July 14.

Legacy after limitations for life and in default of children to be paid equally between two perſons or the whole to the ſurvivor of them, held not veſted till the time of diviſion.

WILLIAM MANTELL by his will, dated the 2d of *October* 1761, reciting his marriage ſettlement, in purſuance of the power therein gave the whole ſhare and parts of ſuch ſtock, which he had power to diſpoſe of, to truſtees and their heirs, in truſt after the deceaſe of his wife, dying without iſſue by him, to pay his ſiſter *Jane Daniell* the intereſt of 1,000*l.* out of the ſtock during her natural life; and after her deceaſe the principal or produce of the ſaid 1,000*l.* to be paid to her two ſons *James Daniell* and *Francis Daniell*, ſhare and ſhare alike, to their own proper uſe for ever; in caſe they ſhould be living at the time of their mother's deceaſe: but, in caſe either of them ſhould die before their ſaid mother, then the whole principal or produce of the ſaid 1,000*l.* to be paid to the ſurvivor of them for his own proper uſe and behoof for ever; and alſo to pay his ſiſter *Margaret Sunderland* the intereſt of 300*l.* out of the ſaid ſtock during her natural life; and her receipt to be a diſcharge for the ſame, without the control of her huſband; and the principal or produce thereof after her deceaſe to be paid to her child or children, if more than one, ſhare and ſhare alike; and alſo to pay his brother *Henry Mantell* the intereſt of 200*l.* for life, and the principal to his children, in the ſame manner: but in caſe *Margaret Sunderland* and *Henry Mantell* ſhould die leaving no iſſue, then to pay the intereſt of the 300*l.* and 200*l.* to his ſiſter *Jane Daniell* for life; and after her deceaſe the principal or produce of the ſaid 300*l.* and 200*l.* to her children ſhare and ſhare alike for their own uſe for ever: if only one, to that one; and farther reciting, that he was poſſeſſed of 2,100*l.*

2,100*l.* Bank Stock 4 *per cents.* 1760, he gave to one of his truſtees 100*l.*, part thereof, and the reſidue of the ſaid ſtock he gave to his ſaid truſtees and their heirs; in truſt to pay his mother *Jane Mantell* the intereſt of 600*l.* ſtock, part of the ſaid ſtock, during her natural life; and after her deceaſe to pay the ſaid 600*l.* to his ſaid ſiſter *Jane Daniell*; and as to the reſt of his ſaid ſtock, in truſt for his truſtees to pay the intereſt, dividends, or produce, to his wife *Mary Mantell* during her life; and after her deceaſe to his children, to be equally divided between them: but if only one child, then the whole to ſuch child, or to ſuch child or children as ſhe may be with child of, and born after his deceaſe: but in caſe his wife ſhall leave no child or children of his at her deceaſe living, then to pay the intereſt of 400*l.*, part of the ſaid ſtock, to his ſiſter *Margaret Sunderland* during her life; and after her deceaſe the ſaid 400*l.* to be paid to her child or children, ſhare and ſhare alike, if more than one; and to pay the intereſt of 1,000*l.*, other part of the ſaid ſtock, to his ſiſter *Jane Daniell* during her life; and after her deceaſe the ſaid 1,000*l.* to be paid equally between her ſaid two ſons *James* and *Francis Daniell*, or the whole to the ſurvivor of them; declaring his will, that as the ſaid monies are in the Eaſt India Stock or Bank Stock, and to avoid diſpute, thoſe legacies and truſt of payments on the diviſion are to be paid in ſuch proportion more or leſs in the hundred pounds as the ſaid Stocks ſhall at that time produce. He appointed the truſtees and his ſiſter *Jane Daniell* executors.

By a codicil, dated the 26th of *January* 1762, the teſtator gave his ſiſter *Jane Daniell* 200*l.*, to be paid out of his 4 *per cent.* annuities of 1760 upon the condition following; that his intent and meaning was, that the ſaid 200*l.* ſhould be appropriated to the uſe of her youngeſt ſon *Francis*, to put him apprentice to ſuch trade as his mother ſhould judge proper; and directed, that his ſaid money ſhould not be paid till the time of his being put out apprentice or to a clerkſhip: but ſhould he die before being put out apprentice, in that caſe the teſtator gave the ſaid ſum of 200*l.* in equal ſhares to his ſaid ſiſters *Jane Daniell* and *Margaret Sunderland* for their uſe for ever.

The teſtator died in 1766. His wife had no children by him. She married *Thomas Colby*, one of the truſtees; and died in 1799.

Margaret

Margaret Sunderland died in the life of *Mary Colby*; having never had any iſſue. *Jane Daniell* alſo died in the life of *Mary Colby*. *James Daniell* and *Francis Daniel* were her two only children. *Francis* died in 1793 inteſtate, after the death of his mother; leaving *Anne Daniell*, his widow and adminiſtratrix.

The bill was filed by *James Daniell*, and *Robert Hubble*, executor of *Mary Colby*, againſt the repreſentatives of *Thomas Colby*, the ſurviving truſtee, and *Anne Daniell*; praying a transfer to *Hubble*, as executor of *Mary Colby*, of 400*l.* 3 *per cent.* Reduced Annuities, (the ſtock having been reduced by act of Parliament) part of the ſaid 1,400*l.* Stock, and the dividends accrued ſince the death of *Mary Colby*; a transfer of the 1,000*l.* 3 *per cent.* Reduced Annuities to the plaintiff *Daniell*, and the dividends ſince the death of *Mary Colby*; or, in caſe *Francis Daniell* took a veſted intereſt in one moiety, then a transfer of one moiety to the defendant *Anne Daniell*; who inſiſting, that her huſband took a veſted intereſt, claimed 500*l.* of the Stock.

A queſtion ſuggeſted, that the 400*l.* did not fall into the reſidue, was given up by the defendants.

Mr. Romilly and Mr. Phillimore for the plaintiffs—The only meaning of the words " or the whole to the ſurvivor of them," under which the plaintiff *Daniell* claims, is the ſurvivor at the death. The teſtator ſpeaks of the death of *Jane Daniell* as happening after the death of his wife; and if both are not living, then he gives it to the ſurvivor of them at that time, at which it was to veſt in poſſeſſion. The 400*l.* not being given after the diſpoſition to the children of *Margaret Sunderland* muſt be conſidered in the event undiſpoſed of.

Mr. Sutton and Mr. Roper for the defendants.—As to the 1,000*l.* Stock, *Francis Daniell* having ſurvived his mother was equally entitled with his brother. The beſt mode of conſtruing that part of the will is to look to other parts, to ſee what was meant by the word "ſurvivor." He meant, that, if neither ſhould die in the life of the mother, both ſhould be equally entitled: if one ſhould die in the life of the mother, his repreſentative would not be entitled. The plaintiff's conſtruction, taking any other period,

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muſt ſtand upon conjecture. There is no reaſon, why this ſum ſhould go to theſe young men in any other way than the prior ſum of 1,000*l.*

The Maſter of the Rolls—There is no doubt upon either queſtion. Firſt the 400*l.* is clearly undiſpoſed of. As to the 1,000*l.* the only queſtion is, to what period the ſurvivorſhip relates. There can be no doubt upon that; when we ſee the limitations, firſt to the widow for life, then to the children: if no child, then to Mrs. *Daniell* for life; then equally between her two ſons, or the whole to the ſurvivor of them. It is clear, he meant the ſurvivor at the time of the diviſion. He did not conceive, that would take place, till both his wife and Mrs. *Daniell* were dead. He conceived, the deaths would happen in the order of the limitations. The mode, in which he diſpoſes of the other ſum confirms, inſtead of oppoſing, this conſtruction; ſhewing, that the period of diviſion was the period, at which he intended it to veſt. He had the ſame meaning as to this fund. He, who is alive, when the diviſion is to take place, takes the whole of the capital; which muſt be transferred accordingly to the plaintiff *Daniell;* and the 400*l.* Bank Annuities muſt be transferred to *Hubble*.

July 7. 13. 15.

MAWSON *v.* STOCK.

A ſeparate agreement, ſecuring to ſome creditors, who had executed a deed of compoſition, a greater advantage than the other creditors would have under the deed, and without their knowledge, cannot be enforced.

In *February* 1796 a Commiſſion of bankruptcy iſſued againſt *William Stock*. Afterwards a propoſal being made for a compoſition at 8*s.* in the pound, by a deed, dated the 30th of *April* 1796, reciting the bankruptcy, and that *Stock* had propoſed, and his creditors had agreed to accept, a compoſition of 8*s.* in the pound in full diſcharge of their ſaid reſpective debts, and in conſideration thereof had agreed to releaſe and diſcharge *Stock*, his heirs, executors, and adminiſtrators, eſtate, and effects, of and from the debts ſo to them due and owing from him, and alſo to join in a petition for ſuperſeding the Commiſſion, and that *Stock* had upon the date of the deed delivered to his creditors three promiſſory notes, ſigned by his ſureties, *Sabine*, *Newby*, and *Norton*, for

8*s.* in the pound, it was witneſſed, that in conſideration of the premiſes the ſaid creditors for themſelves and partners did releaſe to *Stock*, his heirs executors, and adminiſtrators, all actions or cauſes of action they ever had, or could or might thereafter have, for any cauſe or thing previous to the date of the ſaid Commiſſion; and for the conſiderations aforeſaid the ſaid creditors relinquiſhed and gave up to *Stock*, his executors, adminiſtrators, and aſſigns, all and ſingular the ſtock in trade, houſehold goods, &c. book debts, and other debts and ſums of money, due, owing or belonging, to him from any perſon or perſons whomſoever, and all bonds, bills, notes, and other ſecurities, for the ſame, and all other the eſtate and effects whatſoever, of *Stock*, whereof or wherein he or any perſon or perſons in truſt for him or for his uſe was or were ſeiſed, poſſeſſed, or intereſted, on the day of the date of the Commiſſion, or upon any day ſince, and all benefit and advantage whatſoever, to be made, had, or derived, thereby and therefrom; with a covenant to join in a petition to ſuperſede the Commiſſion; and a proviſo, that *Stock* would indemnify the aſſignees and his creditors from all charges, &c. reſpecting the deed of compoſition.

At the date of the deed of compoſition the bankrupt was indebted to *Mawſon* to the amount of 2,221*l.* 4*s.* 10*d.*; and had given him bills and notes for ſecuring part, *viz.* 1,107*l.* 5*s.* 5*d.* *Mawſon* proved and received a dividend of 8*s.* under the deed upon the whole ſum of 2,221*l.* 4*s.* 10*d.* Afterwards he received 20*s.* in the pound upon one of the bills, and different ſums upon the others; and as he inſiſted upon retaining to the extent of 12*s.* in the pound, the Commiſſion having been ſuperſeded, *Stock* brought an action againſt him for the amount of that dividend; which he recovered; and a motion for a new trial was refuſed (*a*).

The bill was filed by *Mawſon*; praying an injunction to ſtay proceedings in that action; and that an agreement mentioned in the bill might be declared binding, and be carried into execution. The bill ſtated the agreement, dated the 23d of *May* 1796, and ſigned by *Mawſon* and four other creditors; reciting the deed of compoſition, as bearing even date therewith; and that previous

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(*a*) *Stock* v. *Mawſon*, 1 *Boſ.* & *Pul.* 286.

to the delivery of the notes for the compoſition it was agreed, that the holders of ſuch bills and notes as were then become due, and were fully paid, ſhould deduct the amount of ſuch bills and notes from their reſpective debts, and receive the compoſition only upon the reſidue; and that the holders of ſuch bills and notes as were not then due, or not then fully paid, ſhould give an undertaking to refund 8*s.* in the pound upon the amount of ſuch bills and notes as ſhould be afterwards reſpectively paid in full, ſo ſoon as the ſame ſhould be received; and that no bills or notes ſhould be compounded without the conſent of two of the ſureties.

For the plaintiff it was proved, that, though *Stock* was not a party to the agreement, the inſtructions were given in his preſence and hearing; and with his conſent and approbation. The agreement was prepared by the attorney, who ſued out the Commiſſion, and prepared the deed, and was ſigned by the plaintiff and four other creditors, upon the propoſition of one of the ſureties. It was intended to bear even date with the deed; and a blank left for the date was afterwards, but before the ſigning, filled up, but by miſtake dated in *May*, inſtead of *April*, 1796: but it was underſtood, that the whole conſtituted but one tranſaction; and the agreement was conſidered as incorporated in, and explanatory of, the deed. The plaintiff compounded one of the bills with the conſent of two of the ſureties and of *Stock*. The ſureties withheld the notes for the compoſition for ſeveral months in conſequence of the bill holders refuſing to ſign ſuch agreement. The plaintiff received the amount of ſome of the bills; and paid according to the agreement the 8*s.* in the pound to *Stock*'s ſhopman; who gave a receipt.

Henry Hogarth proved the agreement, *&c.*; and ſtated, that in *May* 1796 *William Wallis* came with *Stock* to the plaintiff; and produced ſome deeds and papers. The plaintiff ſaid, it would take a long time to read them; and would not ſign them without reading; though preſſed: but *Wallis* ſaying, he would not call again, and the Commiſſion muſt be proceeded in, and *Stock* ſaying, he and his family would be ruined, if the plaintiff did not ſign, the plaintiff aſked *Wallis*, whether, in caſe he ſhould ſign, he would ſtand exactly in the ſame ſituation as if the Commiſſion had gone on. *Wallis* anſwered, "Yes, moſt aſſuredly," upon which the plaintiff ſigned; expreſſing, that he did ſo, relying upon that. *Stock* frequently applied to the deponent, to prevail upon the plaintiff to ſign the deed and the agreement.

The defendant by his anſwer denied to the beſt of his knowledge and belief, that any ſuch bills, notes, *&c.* particularly of the plaintiff's, were not due at the date of the bankruptcy; and believes, they were due at the date of the deed; though ſome were not fully paid. He has heard, that the agreement of the 23d of *May* was entered into; but denies, that ſuch agreement was prepared, or entered into, or ſigned, at the inſtance or requeſt of the defendant; or, that he was privy to ſuch agreement. He denies, that it was the general intention, that the bill holders ſhould retain the bills, and pay the 8*s.* *&c.*; and that it was underſtood by him or his ſureties, or, as he knows, by his attorney; ſtating, that the other bill holders delivered up their bills, *&c.* He admits the receipt of one of the bills by the plaintiff, the payment of 8*s.* in the pound, and the receipt given by his ſhopman; and that it was with his privity, but not with any intention of ratifying the agreement; but by the advice of the attorney; who deſired the defendant to take any thing he could get as an acknowledgement. He denied, that it was the intention of the deed, that the bill holders ſhould be in the ſame ſituation as if the Commiſſion had gone on; or that the agreement was incorporated in or explanatory of the deed.

Some of the bill holders, who upon executing the deed of compoſition gave up their bills, were examined by the defendant.

This cauſe, having been fully argued by Mr. *Romilly* and Mr. *Heald* for the plaintiff, and Mr. *Manſfield* and Mr. *Leach* for the defendant, ſtood for judgment.

July 18.

Lord Chancellor—Upon the deciſion between theſe parties at Law I formerly had ſome doubt, whether the caſe was properly decided: but that opinion was haſtily formed; for upon the beſt conſideration I am clearly of opinion, that under the circumſtances diſcloſed to the Court of Law that judgment was right. The caſe did not bring before that Court a great variety of circumſtances, that have appeared in this cauſe. The exiſtence of the agreement, the circumſtances of the conduct of *Stock*, alleged by this bill to have taken place, which could have raiſed in the contemplation of that Court any queſtion upon the equity, which in an action for money had and received might have formed a ground of defence, were not diſcloſed: but the ſimple queſtion was, whether the effect of the deed of compoſition was ſuch, that *Stock* had a right after the execution of that deed to recover. This bill does not proceed upon any ground alleging, that that deciſion was wrong. I think, it was right, upon the following grounds: 1ſt, that there was a Commiſſion of bankrupt taken out againſt *Stock*, that produced proof of debts for creditors of different deſcriptions: creditors, who held no bills: creditors, who held bills; and creditors of the deſcription of *Mawſon*, holding bills for part of their demands, and not for the reſidue. Under thoſe circumſtances the bankrupt ſeems to have been anxious to have the Commiſſion ſuperſeded; and he propoſes, according to the caſe in the Court of Common Pleas, and without reference to the additional circumſtances before this Court, a deed of compoſition. The creditors ſign the deed; and give him a full diſcharge from all their demands; releaſing him and his eſtate entirely as againſt all their demands; and they agree to aſſign all his eſtate to him, and to aſſign over all their ſecurities; and I mention it, becauſe I do not think, the word "bills," as it ſtands in that part of the deed, has the ſenſe the Court of Common Pleas put upon it; for the words are "due and owing to him;" and theſe bills are for money due and owing from him.

It is impoſſible to ſay, the bill holders, both with regard to the bankrupt himſelf and the other creditors, could have a right to receive more than 8*s.* in the pound. The bill holders are of two deſcriptions: 1ſt, holders of bills, upon which the bankrupt would be primarily liable, and bound to indemnify the other perſons, whoſe names are upon the bills; and others, holding bills, under which, though he is liable, other perſons are primarily liable, and bound to indemnify him. As to the firſt claſs, where bills drawn for the accommodation of the bankrupt were accepted, or, where he was the acceptor with effects, and liable to indemnify all the other perſons, the neceſſary conſequence of this operating as a releaſe would be, that, when the bankrupt paid 8*s.* in the pound, if the holders went to the acceptor for the bankrupt's accommodation for the remaining 12*s*., though the holders had given him a diſcharge in full, and ſo as to make him a new man, that acceptor paying the 12*s*. in the pound would have had an unanſwerable demand againſt the bankrupt for that 12*s*. Therefore againſt the faith of that tranſaction that demand is brought down upon the bankrupt; when the diſcharge was given for 20*s*. It has been held in bankruptcy, that after a voluntary diſcharge from the whole debt by agreement, (I do not mean by an Inſolvent debtor's Act), the creditor cannot make uſe of a ſecurity he has againſt third perſons; where the effect would be to ſet up again, though in another form, and in the ſhape of the demand of another perſon, the bankrupt's liability. This would not hold, where the bankrupt was not primarily liable. Where the bankrupt is drawer, and the acceptance is upon the credit of effects in the hands of the acceptor, the general effect of a releaſe of the drawer would not releaſe the acceptor; for it would be *pro tanto* relieving the acceptor, and no prejudice to him whatſoever. The queſtion then would be, not, whether the acceptor might ſay, the holder ſhould not recover againſt him, but, whether the drawer having paid 8*s*. might not ſay to the acceptor, "You ſhall not pay except for my benefit." Upon that view the obſervation is juſt; when it is ſaid, they aſſigned all his eſtate to him. Then it comes to this queſtion: Can you in an action ſo mixed, containing ſo many different equities, ſay, one thing was meant as to one bill holder, and ſomething very different as to another? There is nothing in the inſtrument, ſhewing, ſuch a diſtinction was intended; and I think, it was not. That is one of the inconveniences ariſing from the doctrine, that you may ſet up in anſwer to the objection for want of notice to the drawer, that there were no effects in the hands of the acceptor. There never was a deciſion, with a view to public policy, more miſchievous. Upon that doctrine a great part, if not the whole, of the miſchief of accommodation paper, ſhort in its conſequences only of the miſchief, that would follow any attempt at this day to cure it, is founded.

Held in bankruptcy, that after voluntary diſcharge by agreement the creditor cannot make uſe of a ſecurity againſt third perſons; where the effect would be to make the party diſcharged again liable, though in another form and in the ſhape of the demand of another perſon.

Under theſe circumſtances, I think, the deciſion at law is right. It was objected, that, if ſo, there is no ground for relief in this Court; becauſe the caſe ſtated by the bill would have formed a defence at law. If the caſe made by the bill could be made out in point of fact, I think, it would be a defence at law. The action was for money had and received, founded upon the equitable title to receive; and therefore defeated by the equitable title to retain. If this caſe had been proved at law, I do not ſee, how the plaintiff could have recovered. The caſe inſiſted upon at law was, that the intention of all parties was, that, let the conſequence to the bankrupt and the other creditors be what it might, the bill holders ſhould be left in poſſeſſion of a right to work out payment of 20*s.* in the pound; that it was generally underſtood by all the creditors; and therefore a fraud upon none; and, if not generally known, the plaintiff at law had ſtated to *Mawſon* what was tantamount to a declaration, that ſuch was the intention; and that he executed the inſtruments under the confidence created by the aſſertion, that the conſequence of his executing them at the deſire of *Stock* would be, that he would be able to recover againſt all the bill holders, until he ſhould be ſatisfied 20*s.* in the pound; therefore in equity *Stock* is bound to make good that repreſentation; and the deed in equity ſhould be read accordingly; and therefore it was againſt conſcience, that he ſhould recover contrary to that; and that he ſhould be heard to ſay, the deed had a different effect from his repreſentation. But the propoſition, ſo ſtated, embraces two facts: 1ſt, Whether *Stock* made any repreſentation, upon which *Mawſon* proceeded: 2dly, Whether it was a repreſentation, that entitles *Mawſon* to ſay all he has now ſuggeſted; not only, that it was intended by *Stock* and *Mawſon*; but that *Stock* undertook to aſſure *Mawſon*, he might act upon it, as if all the creditors knew it. I expreſs it ſo; for it is impoſſible to deny, that, where a large body of creditors, partly conſiſting of bill-holders, having a right to apply, not only to the common debtor, but alſo to others, all enter into a deed of compoſition, by which all on the face of it accept 8*s.* in the pound in abſolute diſcharge of their demands, it is not competent to a particular deſcription of creditors to go into another room, and ſay, that with the debtor they make a freſh agreement for their benefit; that, though they have abſolutely diſcharged him in the preſence of the others, yet by the ſeparate agreement they will hold him ſo engaged to them, that they ſhall receive 20*s.* in the pound; and ſo to bring upon him the claims of others; from whom they receive that; though the other creditors think him abſolutely diſcharged. That is a fraud upon the policy of the law, and upon

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upon the other creditors: a fraud upon third perſons, of which, it has been uniformly held, that the debtor may take advantage.

If it ſtands upon the deed, and it does not appear, that other creditors knew of it, it is very difficult either in law or equity to ſuſtain the caſe of the plaintiff. It is to be obſerved, this is not a deed, attaching upon a man untouched by any proceſs at law, but upon a man at that moment under a Commiſſion of bankrupt. The caſe muſt be conſidered with regard to all the circumſtances attaching upon that ſituation. Upon the anſwer it appears, the tranſaction was in *April* and *May*; and the Commiſſion was not ſuperſeded till *November*. The petitioning creditor was one of theſe bill holders. That creditor could not poſſibly agree to ſuperſede the Commiſſion, taking more upon his debt than any other creditor; whatever his ſecurity was. Alſo, if a creditor, a bill holder, had been paid part of his demand by any perſon, whoſe name was upon the bill, and who would have a right to ſay, he had paid as ſurety of the bankrupt, that creditor might come at any time; deſiring, that the proof ſhould not be ſtruck out, but ſhould remain in truſt for his benefit. Theſe circumſtances were not ſufficiently attended to. It was abſolutely incumbent upon the bill-holder to make out, that there was ſuch an agreement, not only between him and the bankrupt, but between the bankrupt and all the creditors; and all the Judges go upon this; that unleſs all the other creditors knew of it, it would be a fraud; and then *Mawſon* could not retain what he had received upon theſe bills.

The fact, charged in the bill, that the intention of the parties to the deed was, that ſuch of the creditors, who were bill holders, ſhould be put in the ſame ſituation, as if the Commiſſion had proceeded, is a fact, of which the deed is ſo far from being evidence, that it is evidence to the contrary; and there is no evidence connecting the tranſaction with the bill holders with the knowledge of the other creditors; much leſs, connecting it as the effect of their intention, that the bill holders ſhould have that advantage. *Stock* by his anſwer ſays, it was not the intention; and he carries his denial to a length, that ſurpriſes me, conſidering the evidence. He muſt have known, as I am ſatiſfied his ſureties knew, that there was an agreement with the bill holders to that effect. If the agreement was prepared without his knowledge; and thereby a demand was raiſed againſt him, which the bill holders would not have had under the releaſe itſelf, that was an act, that could not be done without a ſpecial authority from him or ſubſequent approbation. But ſtill if the general creditors did not know that tranſaction, and did not mean, that the deed ſhould operate one way as to them, and another way as to the other creditors, the policy of the law will reach the tranſaction; whatever the intention of *Stock* might be; unleſs there was a diſtinct undertaking, if ſuch a thing could be, that no queſtion upon the policy of the law could ever ariſe; and there might be, I think, that diſtinct undertaking; which would have bound him ſo that he ſhould not ſay, the other creditors did not know the tranſaction, and had not ſuch intention. But the evidence does not amount to that by any means. It is incumbent upon the plaintiff diſtinctly to prove, that ſuch was the intention of the other creditors; when it is diſtinctly denied by the anſwer. It is clear, the deed and the agreement were intended to bear even date, and were prepared together: a circumſtance, that induces me to believe, the creditors did not know this; for then the tranſaction, if fair, ought to be by one deed; and it could not be fair to leave theſe creditors the chance of getting 20*s.* in the pound; the conſequence of which would be, that *Stock* would not be diſcharged. Suppoſe, the plaintiff had read the inſtruments, and had collected an aſſurance from them, that he was to ſtand in the ſame ſituation as if the Commiſſion was to go on: ſtill, if he acted upon that aſſurance, ſo collected by himſelf, he could not have held the benefit of that bargain; unleſs the other creditors knew he had acquired it. Upon *Hogarth*'s evidence it may be aſked, how could *Stock* be totally ruined, if *Mawſon* did not ſign the writing upon that day; unleſs there was ſomething more in it than what *Stock* ſays? It is impoſſible, that the queſtion he ſtates afterwards could have been aſked, unleſs conſequential upon previous communication; and it is ſingular, when the act to be done was to have the effect of ſuperſeding the ommiſſion. The evidence, ſtate it as high as you will, comes only to this; that *Mawſon* wiſhed to have an aſſurance, that the deed would place him in the ſame ſituation, as if the Commiſſion was not ſuperſeded. I am willing to go the length, though there is but one witneſs againſt the anſwer, of ſaying, that there is evidence enough in the circumſtances to authoriſe me not to believe the Defendant, and to take it, that *Wallis* did with his privity give the aſſurance to the extent mentioned in the depoſition: but the queſtion reſults, whether theſe creditors can take the benefit of a ſeparate agreement; the plaintiff not proving, though loudly called upon by what is put in iſſue and what paſſed in the Court of Common Pleas to prove, that he was acquiring theſe benefits for himſelf with the knowledge of the other creditors. In that he has totally failed.

With this view of the caſe I am of opinion, that upon the policy of the law this bill cannot ſucceed. I have gone fully into it; that the ground of my judgment may be underſtood. The defendant upon the equity ariſing out of the ſituation of the other creditors, not founded upon any thing righteous as between him and the plaintiff, has a right to ſay, the plaintiff cannot ſucceed in this bill. Though I diſmiſs the bill, yet upon the anſwer, connected with all the evidence, I do not diſmiſs it with coſts.

POLE *v.* LORD SOMERS.

July 14. 16.

In a caſe both of election and ſatisfaction by the will of a parent as to two ſubjects of claim by his younger children under a ſettlement a caſe of election was raiſed as to a third ſubject, ſtock veſted in truſtees, upon the conſtruction of the will.

The queſtion, whether evidence, *viz.* a ſchedule written by the teſtator ſubſequent to the will, could be admitted, was not decided.

BY indentures of ſettlement, previous to the marriage of *Reginald Pole* and *Ann Buller*, dated the 26th of *April* 1751, the fortune of *Ann Buller*, conſiſting of ſeveral funds, amounting in the whole to 3,500*l.*, were directed to be paid to truſtees; and *Reginald Pole* covenanted with the truſtees to do all acts for empowering them to receive the ſaid monies; upon truſt to inveſt the ſame in lands of inheritance, to be ſettled to the uſe of *Reginald Pole* for life, without impeachment of waſte; remainder to *Ann Buller* for life; and after their deceaſes to the uſe of all and every ſuch child or children as they ſhould have, in ſuch ſhares and proportions, and at ſuch times, and under ſuch reſtrictions, as *Reginald Pole* ſhould appoint by deed or will; and for want of his appointment, according to the appointment of *Ann Buller*, ſurviving him; and, in default of appointment, then to and among all and every ſuch child and children and their heirs, equally between them, ſhare and ſhare alike, as tenants in common, and not as joint tenants; in caſe there ſhould be more than one; and in caſe there ſhould be no ſuch child, upon other truſts.

The ſum of 950*l.*, part of 1,071*l.* 8*s.* 7*d.*, one of the truſt funds, which was paid to the truſtees, was laid out in the purchaſe of the manor of *Cotleigh;* which was conveyed to the uſes of the ſettlement; and the remainder of that ſum, after defraying the expences, was received by *Reginald Pole.* *Ann Pole* died in 1758. The iſſue of the marriage was five children. Another part of the funds, to the amount of 1,000*l.*, was paid to the truſtees upon the 24th of *March* 1761, and was inveſted in their names in 1,025*l.* 12*s.* 10*d.* 4 *per cent.* Conſolidated Annuities. The ſum of 1,385*l.* 14*s.* 3½*d.*, all, that was received upon the remaining truſt funds, was received in 1764 by *Reginald Pole*, and was mixed with his own money.

Reginald Pole by his will, dated the 19th of *March* 1767, after ſeveral ſpecific legacies, and giving his chambers in the *Temple* to his eldeſt ſon *Reginald*, gave *Mary Collins* an annuity of 6*l.* for life; for the payment of which he charged all his eſtate and effects both real and perſonal. Then reciting, that his aunt *Hawkins* had promiſed to give him 2,000*l.*, of which ſum ſhe had already advanced him 1,000*l.*, in aſſured confidence, that ſhe would fulfil the ſaid promiſe, he gave his daughter *Ann* 2,000*l.* and to his daughter *Sarah* 2,000*l.*, to be paid at the age of twenty-one, or marriage, provided with the conſent of his executors and their aunts; if without conſent, he revoked the legacy; and gave the ſame equally among all his other children, ſhare and ſhare alike. He gave his ſon *Charles Morice* 2,000*l.*, when twenty-one; and to his ſon *Edward* 1,000*l.*, when twenty-one; aſſigning the reaſon of the difference, that his aunt *Hawkins* had lately aſſured him, that the 1,000*l.* remaining, before mentioned as unpaid, ſhe had by will given to *Edward;* and had alſo obliged him (the teſtator) to promiſe in writing to give the ſaid 1,000*l.*, if it came into his poſſeſſion, to his ſaid ſon; directing it accordingly to be paid in that event to his ſaid ſon. The maintenance and education of his children during their minority he directed to be taken from the whole produce of his real and perſonal eſtate; always taking care, that the expences did not exceed the growing profits.

He alſo empowered his executors to ſell, if they think proper, his chambers in the *Temple*, and alſo, if neceſſary, the manor of *Cotleigh*; and to apply the produce during his ſon *Reginald*'s minority to any uſe or purpoſe they ſhould judge would be for his benefit and advantage; and he empowered them to lay out any part of his ſaid younger ſons' reſpective fortunes during their reſpective minorities to any uſe or purpoſe for their reſpective benefit and advantage. All the reſidue of his eſtate and effects both real and perſonal not before deviſed, after payment of his debts and legacies, he gave and bequeathed to *Reginald*, his eldeſt ſon.

At the bottom of the will was a memorandum, dated the 20th of *September* 1767, that one of the ſums of 1,000*l.* before mentioned, given to his daughter *Sarah*, was the 1,000*l.* formerly received of his aunt *Hawkins*, at her requeſt given by him to his daughter *Sarah*.

The ſum of 1,000*l.*, mentioned in the will to have been promiſed by the teſtator's aunt, was paid to him in his life. He died in *November* 1769, not having made any appointment. The bill was filed by *Edward Pole;* praying, that the plaintiff may be declared entitled to one fifth part of the ſaid eſtate and effects, and an account of the rents and profits received by the defendant *Reginald Pole Carew*, the eldeſt ſon, *&c.*

The anſwer, which was not replied to, ſtated, that at the death of the teſtator the ſum of 1,025*l.* 12*s.* 10*d.* 4 *per cent.* Annuities was ſtanding in the names of the truſtees: but except that fund and the manor of *Cotleigh* they had no other part of the truſt property: the reſt having been received by the teſtator, and mixed with his own property. Among the papers of the teſtator was found a ſchedule or eſtimate of the ſtate of his perſonal property down to the 4th of *September* 1769, written by the teſtator. The only part of his perſonal property not mentioned in that ſchedule was the furniture of his houſe. Beſides the eſtates mentioned in his will he had a tenement for the lives of himſelf and the plaintiff, producing ſomething leſs than 29*l.* a year; and three farms were ſettled after the marriage upon him and his wife and their iſſue, in the ſame manner as by the other ſettlement; and for want of ſuch iſſue, or an appointment by the teſtator, to him and his heirs. The anſwer inſiſted, that the teſtator meant to diſpoſe of all the truſt property; as the manor of *Cotleigh* was by the will ſpecifically given to the defendant; and as he had not aſſets to anſwer the legacies of 2,000*l.* each to his four younger children without the application of his truſt funds; and the ſaid legacies appear calculated upon the property in the ſchedule, which comprifed the ſtock and the ſum of 1,385*l.* 14*s.* 3½*d.*

The ſchedule referred to by the anſwer began thus:

" This is not to be annexed to my will; being only intended " for giving in one view to my executors the ſtate of my ſe- " curities."

Then after ſtating ſeveral ſecurities, bonds, notes, mortgages, &*c.* came this entry: " Stock in my truſtees' names, *Philip Raſh-* " *leigh* and *John Buller* in 4 *per cent.* Conſols, coſt 1,000*l.* at " 97 three-eights one eight brokerage 1,025*l.* 12*s.* 10*d.*"

Afterwards under the date 24th *June* 1769 were the following entries:

" Deduct - -	£. 2,020	0	0
" Do. C S. S. Annuities -	1,119	0	0
" Do. *Llanrath* - -	1,385	14	3½"

Other entries followed; and the laſt date was the 4th of *September* 1769.

Mr. Mansfield, Mr. Alexander, and Mr. Stanley, for the plaintiff—Under the effect of this paper, found among the teſtator's papers, but not proved as part of his will, it is contended, that the teſtator meant to diſpoſe of the whole of the truſt property. The teſtator gives his executors power to ſell the manor of *Cotleigh*; and it cannot be diſputed, that he acted upon that as his own; and a diſtinct intention appears in the will, that his eldeſt ſon ſhould have the benefit of that. With reſpect to the 4 *per cent.* Annuities, ſtanding in the names of his truſtees at his death, it does not appear, that he had that fund in contemplation. There is no caſe of election, where it does not appear upon the face of the will, that the teſtator meant to diſpoſe of that property, out of which the claim was made, as his own. There is nothing of that ſort in this will. If this ſchedule is to be taken into conſideration, he does conſider that fund as part of his property: but the ſchedule cannot be looked at. It could not be proved as teſtamentary; for at the beginning he directs, that it ſhall not be annexed to his will. It cannot be read as any evidence by way of addition to the will, and to ſhew the effect of it, ſo as to raiſe a caſe of election as to this part of the truſt fund. The claim of the defendant muſt be under the reſiduary bequeſt. The natural import of the words is only what was his property. It has been decided, that mere general words, without reference to a power, cannot apply to the ſubject of that power (*a*). To take this paper into conſideration would be introducing evidence in a way, in which it never has been permitted, and, contrary to all the rules, conſtruing a written inſtrument by collateral evidence. The queſtion is, whether under the words " my eſtate and effects" he meant to include this particular fund. The great diſtinction between *Hinchcliffe* v. *Hinchcliffe* (*b*) and many other caſes there noticed is, that in all of them the books and papers were produced to ſhew the fact, that from the ſituation of the property it naturally fell within the deſcription of the will; that the property ſaid to be claimed againſt the will was actually within it; that the teſtator had dealt in ſuch a way as to make it his eſtate. Lord *Alvanley* in *Hinchcliffe* v. *Hinchcliffe* ſtates diſtinctly, that he would not ſuffer the evidence to conſtrue the will. In this inſtance it is applied to ſhew, he meant this ſubject; though it was not his. Upon the will the only argument is, that having given his eldeſt ſon the manor of *Cotleigh*, that being a part of the truſt property, though not in the hands of the truſtees, he meant to give him the whole. That is much too ſtrong an inference. If he forgot the ſettlement, that cannot avail the defendant. An intention for election is not to be inferred from looſe words. This would be a bad appointment: the words of the power being " all and every." With reſpect to that part of the fund, which was received by the teſtator in his life, the caſe is more favourable for the defendant: but there is as expreſs an intention, that it ſhould be ſubject to the debts.

(*a*) *Andrews* v. *Emmot*, 2 *Bro. C. C.* 297. See *ante*, vol. 2. 592.

(*b*) *Ante*, vol. 3. 516.

Mr. Richards, *Mr. Romilly*, *and Mr. Leach*, *for the defendant*.—The queſtion applies only to the ſtock: the reſt of the fund, except that and the manor of *Cotleigh*, being admitted to have been in the teſtator's hands; and therefore being a debt from him to his children; and then there is no doubt, that giving them a greater ſum will be a ſatisfaction. This is a demand of a portion; between which and other debts there is a diſtinction. This is the caſe, not of a perſon exerciſing a power under the ſettlement, but rather of one, who had forgotten the ſettlement. He treated the manor of *Cotleigh* as ſubject, not to his appointment, but to his dominion; and, if that ſhould not be exerciſed, as what would deſcend to his heir. Having certainly forgotten the ſettlement as to the manor of *Cotleigh*, it is very difficult to ſay, he remembered it for any purpoſe. This paper is admiſſible upon principle and authority; not to conſtrue the will, but to ſhew what the teſtator himſelf thought of his property; what he conceived to be his property. You may give in evidence an account of the actual property of the teſtator; that he had made a particular ſubject his own. It is impoſſible, that the propoſition can reſt there. It muſt go farther, to this extent, that he treated property, which was not his own, as his own. If he treated the truſt fund as his own, it is as much his for the purpoſe of this argument as what he mixed with his own money; and then the election is a conſequence. Upon a deviſe of *Blackacre* with its appurtenances evidence is always admitted to ſhew what the deviſor held with it. In *Pulteney* v. *Lord Darlington* (*a*), upon the queſtion of election the rent-rolls of General *Pulteney* were given in evidence, to ſhew, he treated the eſtate tail as his own. In *Wright* v. *Rutter* (*b*) and *Rutter* v. *M'Lean* (*c*) there was a circumſtance clearly dehors the will, as much as in this caſe; *viz.* the deed, under which the will was made; the teſtator thinking the property his own; and the wife was put to her election. There are a great many other caſes of this kind; where the teſtator conceived property not his to be his; and evidence of this kind has been admitted. *Eden* v. *Smyth* (*d*) certainly is not a caſe of this ſort. For ſome time the Lord Chancellor doubted very much the propriety of admitting that evidence; but at laſt admitted it; and principally upon the authority of *Hinchcliffe* v. *Hinchcliffe*. Evidence has conſtantly

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(*a*) Cited *ante*, vol. 3. 521. in *Hinchcliffe* v. *Hinchcliffe*. (*b*) *Ante*, vol. 2. 673.
(*c*) *Ante*, vol. 4. 531. (*d*) *Ante*, vol. 5. 341.

been admitted to ſhew, who is the perſon deſcribed, and what is the ſubject deſcribed. The objection is, that, where there is ſomething to anſwer the deſcription, evidence of any thing farther ſhall not be given. There is no authority for ſuch a diſtinction; and caſes are to be found, which could not have been ſo decided, if ſuch a diſtinction exiſts. Upon that ſuppoſition in the caſe of a legatee deſcribed by both a different chriſtian and ſurname there ought to have been an inquiry, whether there was any one to be found, having both theſe names. In *Smith* v. *Coney* (*a*) a legacy was given to a perſon by the deſcription of the Reverend *Charles Smith* of *Stapleford Tawney* in the county of *Eſſex*. There were two perſons; *Richard Smith*, incumbent of *Stapleford Tawney* at the date of the will; and *Charles Smith*, an officer in the army; and evidence was admitted. In a caſe heard yeſterday your Lordſhip referred it to the Maſter to ſee, whom the teſtator meant by his ſiſter *Jane*. In the caſes of ſatisfaction, by an advancement ſubſequent to the will, evidence of that fact being received, evidence muſt be received of all facts of the teſtator's conduct ſubſequent to the will to ſhew what he intended; and in thoſe caſes the evidence is not applied as an explanation of the will. The other caſe of ſatisfaction, where a portion was originally provided by contract, and then a will gives a portion to the ſame amount, ariſes upon the ſame preſumption. The Court is bound to admit evidence upon the ſame principle; and the will is not affected. The meaning of the will in ſuch caſes is plain: but the queſtion is, whether the teſtator meant, that ſomething collateral to the will ſhould alſo take place; and the evidence is introduced to rebut a preſumption; and it is to be received whether applying to the period before or after the will, the queſtion being, not as to the intention upon the will, but as to an intention collateral to the will. Whether the declarations are before or after the will is perfectly immaterial; if they are evidence of the intention at the time. The opinion expreſſed by Mr. Juſtice *Buller* (*b*) in *Nourſe* v. *Finch*, that declarations ſubſequent ought not to be received, was not approved by Lord *Roſslyn*. *Gulliver* v. *Poyntz* (*c*). As the Court raiſes the preſumption as matter of evidence, they are bound to admit evidence againſt it. That is the ordinary caſe of admitting evidence to rebut a preſumption; which is only a rule

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(*a*) *Ante*, 42.

(*b*) *Ante*, vol. 1. 359.

(*c*) 2 *Black*. 736.

of evidence. In *Hinchcliffe* v. *Hinchcliffe* the evidence was introduced in aid of the preſumption; to confirm the rule of the Court; to ſhew an intention, that the proviſions given by the will ſhould ſtand in the place of the prior proviſion by ſettlement. That was a caſe of the ſame nature as this; a claim under a ſettlement of the mother's fortune, previous to the marriage. The only difference is the power of appointment in this caſe.

If the evidence cannot be received, there is enough in this will to ſhew, the teſtator did not intend, that theſe children ſhould have more than he gave them by the will; and that conſtruction is ſupported by the leaning of the Court againſt a double proviſion, and the favourable conſideration for the heir, appearing in all the caſes of portions.

Reply—All the caſes of election are, where ſettled property has been deviſed; as if it was not ſettled. The money the teſtator mixed with his own certainly raiſes a demand againſt his aſſets; and it is certainly very difficult to argue, that the demand in reſpect of that is not ſatisfied. But the ſtock veſted in truſtees ſtands upon a very different ground. No act has been done to alter the property; and no notice is taken of it in the will; nor does any inference ariſe upon it, except from the diſpoſition as to the manor of *Cotleigh*; which, I admit, does afford ſome; that, as he ſuppoſed, that, which was purchaſed with part of the truſt fund, was his own, ſo he thought the reſt of the truſt fund his own. But that inference is not ſtrong enough to raiſe a caſe of election. It does not follow, that he made the ſame miſtake as to that fund that he did as to the eſtate. There is nothing in the will ſhewing, he did not mean the children to have any thing more. There can be no inconſiſtency in each of them taking one-fifth of the truſt fund remaining unaltered. This diſtribution will not occaſion any inequality. This is not a claim to take from the eldeſt ſon as a debt, any thing in his hands, that paſſed to him by the will. How can the teſtator be ſaid to have dealt with this property? He never altered it. He ſuffered it to remain with the truſtee; receiving nothing but the intereſt; which by the ſettlement he was entitled to receive for life.

As to the paper, there is no difference in this reſpect between that and a parol declaration; and the real queſtion is, whether any parol declaration, at any diſtance of time, twenty or forty years, after the will, can be admitted to ſhew, that when he made his will, he had that ſubject in contemplation. In *Lord Darlington* v. *Pulteney* the will itſelf contained a ſufficient indication of the intention. *Hinchcliffe* v. *Hinchcliffe* does not affect this caſe. In that there did not exiſt, as in this, any truſt property, the ſubject of the ſettlement, in the ſtate, in which it had been ſince the marriage, veſted in truſtees: but all the ſubject of the ſettlement was gone; and it was the ordinary caſe of ſatisfaction. *Wright* v. *Rutter* and *Rutter* v. *M'Lean* are not applicable. There the property was the teſtator's, when he made his will; and it would have been very ſtrong to ſay, the wife ſhould undo that in oppoſition to his will; taking benefits under it. *Eden* v. *Smyth* is ſo ſingular a caſe, that it muſt be conſidered as an exception to all rules, and not applicable to any other caſe. Some diſtinction ſeems to have been there ſuggeſted between parol declarations and and writing: but there cannot be ſuch a diſtinction. That deciſion ſtands upon the ſingular circumſtances of the caſe. The papers might have been burnt at any time. They were all in the teſtator's poſſeſſion. The arguments from other caſes, in which evidence has been admitted to explain a will, have no relation to this. They are all caſes of latent ambiguity; where the will cannot operate, unleſs other evidence is called in. This caſe has no ambiguity latent or patent. In the caſes of the miſtake of the name the inquiry muſt be confined to the family or acquaintance of the teſtator. I admit, upon queſtions of ſatisfaction evidence muſt be admitted, and on both ſides, to deſtroy or confirm the preſumption, which the Court raiſes for want of a better ground. From the nature of a preſumption evidence muſt be admitted to deſtroy it, and therefore to confirm it; either written or parol; as in the caſe of the executor and next of kin; in which it is now determined, with reluctance certainly, that it is admiſſible on both ſides. Here there can be no queſtion of ſatisfaction as to the ſtock; unleſs it is previouſly aſſumed, that the teſtator conſidered it his property; and meant to give it.

Lord CHANCELLOR—If by taking farther time I could hope to give a judgment, that would be more ſatisfactory either to myſelf or the parties, I ſhould reſerve an opportunity of farther conſidering this caſe: but I am perfectly ſatisfied, that, whether I have drawn a right concluſion, or not, upon the whole caſe, I ſhall not be able by any farther diſcuſſion with myſelf to alter that opinion. The caſe is not preciſely like any former caſe. It is not purely a caſe of either ſatisfaction, or election. As to the manor of *Cotleigh* it is a caſe of election. As to the ſum mixed with the property of the teſtator, it is a caſe of ſatisfaction; and the queſtion is, how the third ſubject, the ſtock actually veſted in truſtees, is to be treated; regard being had to the fact, that as to the two other ſubjects involved in the ſame truſt it is a caſe both of election and ſatisfaction. The right of the plaintiff reſts upon the effect of ſettlement, the tranſactions prior to the will, as far as they can be looked at in the way, in which the Court can look at them, according to the rules of evidence, upon the will, and upon that paper; if the Court under all the circumſtances is authoriſed to read it. The ſettlement from the frame of it would have left no doubt as to this fund; if in fact it had not been laid out in ſtock; but had been received by the father; for upon the marriage he would have become entitled to theſe funds *jure mariti:* but the form, in which the truſt for the children attaches upon it, is a covenant by the father, that he will do all acts empowering the truſtees to receive the money. If therefore he had received it, and it was in his hands at his death, it would be like *Hinchcliffe* v. *Hinchcliffe*. The money being to be laid out in land, when received, is in this Court to be conſidered as land; and the limitation in default of appointment is, as I underſtand it, to the children as tenants in common in fee; and they had a right to ſay, that, wherever the money was found, it was to be laid out in land upon thoſe truſts. The manor of *Cotleigh* having been conveyed to the uſes of the ſettlement, the children are at law tenants in common in fee of that. The ſum of 1385 *l.* 14 *s.* 3 *d.* having been received by him, and being in his hands, bound by his covenant, he was debtor to his children for that ſum, conſidered here as land; of which they were tenants in common in fee; and the 1000 *l.* paid by his permiſſion to the truſtees, and inveſted in ſtock, muſt alſo be conſidered in this Court as land, of which alſo they were tenants in common in fee. This was the ſtate of affairs at the date of the will. He had it in his power unqueſtionably upon the principles of this Court, as applied to caſes of election, to purchaſe either for himſelf or others the intereſts of his children in both thoſe articles; by tendering to them by his will a conſideration, which they ſhould think more eligible for them than inſiſting upon their rights under the ſettlement in the land, and the money, conſidered as land. As to the ſum in his hands, for which he was debtor to his children, he might, as a debtor of any deſcription, by his will ſatisfy that debt. As a parent, he muſt be taken to have intended to ſatisfy the claim of his children, to whom he was indebted, if the will contains ſuch proviſions as this Court will hold a ſatisfaction of a debt from a parent to his children.

In the bequeſt of the annuity he firſt uſes the words "all my "eſtate and effects both real and perſonal;" upon which he charges that annuity. It would be ſtrong to ſay, he meant by thoſe words in that part of the will to charge with that annuity of 6*l.* the manor of *Cotleigh*, and the ſtock ſtanding in the names of truſtees for his children; and yet I do not know, how it can be ſaid, that by the ſame words in any other part of his will he did mean to embrace thoſe parts of his property, unleſs thoſe words in this part have the ſame meaning. Then he proceeds to provide what he calls, or what upon a fair conſtruction I am entitled to ſay he meant to call, the fortunes of his younger children. In the manner, in which theſe gifts are conceived, with reſpect to being more or leſs beneficially given, there are circumſtances of difference between the proviſion by the ſettlement and that by the will: but it has long been ſettled, that ſlight circumſtances will not alter the doctrine of ſatisfaction in this Court between parent and children. The circumſtance of his aſſigning the reaſon of the difference as to his ſon *Edward* ſhews, he meant equality. He ſeems to have had a perfect reliance on Mrs. *Hawkins*; that if ſhe ſhould ſurvive him, ſhe would give *Edward* the 1,000*l.* He ſeems to have intended, if he ſhould ſurvive her, to give this ſum to his ſon in diſcharge of his duty to her and to him; and he remarks in the memorandum made ſome time after the will, that 1,000*l.* of the 2,000*l.* given to his daughter *Sarah* he had received upon the like condition from Mrs. *Hawkins*. Certainly events might happen, in which *Edward* would receive only 1,000*l.*: *viz.* if Mrs. *Hawkins* had withdrawn her intention of kindneſs: but that would only have raiſed a caſe of election or of ſatisfaction; if the will taken altogether raiſed ſuch a caſe. I agree, the obſervation, that he meant, they ſhould be all equally provided for, does not go for much; for if there was no more, this is only an equal addition to their fortunes. Upon the clauſe directing maintenance it is to be obſerved, that, if the words "my real and perſonal eſtate," as there uſed, comprehend nothing more than what in a ſtrict ſenſe was his real and perſonal eſtate, this direction for maintenance operates in fact as a direction, that the rents of the manor of *Cotleigh*, the dividends of the ſtock veſted in the truſtees, and, if the money in his hands could be claimed as a debt, the intereſt of that alſo, ſhould accumulate; and then it is to be taken as a direction, that the children are to be maintained out of the produce of the real and perſonal eſtate, conſidered as excluſive of theſe three ſubjects. The queſtion then breaks out ſtrongly upon the will, what did the teſtator mean by his real and perſonal property? This is the caſe of a teſtator making the ordinary and uſual proviſion for the maintenance and education of his children out of the rents, profits, and produce, of his real and perſonal eſtate; and looking to the caſe ordinarily looked to in ſettlements and by provident teſtators, he provides for their advancement in the world by giving powers to his executors to break in upon the funds reſpectively given to his children; and he expreſsly gives a power of ſelling the manor of *Cotleigh*. How could he give that power to his executors, unleſs he thought, he had a diſpoſing power over that property, or meant to aſſume that power, or thought he did make a deviſe of it, taking all his will together, under the deviſe of his real and his perſonal eſtate? That conſtruction is ſtrengthened, when you advert to this; that he actually received part of the truſt money; and had that in his hands; a debtor, it may be admitted, for that ſum: but the money received by him was his: the fund, out of which that debt muſt be paid, was his. The fund including it therefore would paſs under the words "my perſonal eſtate:" whether ſubject to debts is another queſtion: but this being the caſe of parent and children, and a proviſion made by the will beyond the amount of the debt, it is diſpoſed of among his perſonal eſtate, not ſubject to the payment of this as a debt; for the proviſions of the will raiſe a caſe, not of election, but of ſatisfaction as to this demand. By his will he has taken upon himſelf to diſpoſe, or thought, he had power to diſpoſe, of the manor of *Cotleigh* and the money received by him as his eſtate, or at leaſt he intended to make it paſs under thoſe words by giving his children a conſideration, raiſing a caſe of ſatisfaction. As to thoſe two ſubjects therefore the plaintiff cannot ſucceed.

The next queſtion is one, which, I own, has embarraſſed me very much: whether under all the circumſtances the plaintiff can ſucceed as to the ſtock. Upon the beſt judgment I can form upon this caſe, conſidered as a very particular caſe, ſtanding almoſt by itſelf, a caſe upon the head both of election and ſatisfaction, I am of opinion, the plaintiff cannot ſucceed. The queſtion, that has been diſcuſſed, is of very great importance, as to the admiſſion of evidence, in order, as it is ſaid on the one hand, to explain the will, and on the other, not to explain the will, but to ſhew, either, what ought to be the effect of two inſtruments upon each other, or, what the teſtator meant with regard to the will as to this ſum of ſtock; and whether he meant to conſider it his own, or, whether what he did by the will manifeſts his intention to purchaſe it for his own eſtate. Upon looking through the caſes, of which there are a great many, to which it is not neceſſary to reſort, the effect being extremely well collected in ſome of them, I think *Hinchcliffe* v. *Hinchcliffe* perfectly well decided. It is no more than this. The teſtator was entitled to an annuity and other property, ſettled, or under covenant to be ſettled, ſo that the children would have had veſted intereſts. At his death no one ſubject of the ſettlement was exiſting, either in him or any party claiming under him, for the benefit of the objects of the ſettlement. The 6000*l.* was otherwiſe diſpoſed of: the leaſehold houſe was ſold: the perſon, for whoſe life the annuity was held, was dead. The will being made, it was abſolutely neceſſary for the Court to know, what had become of the property ſettled; and the reſult of the inquiry was only, that the teſtator had ſo dealt with it, that he was debtor for the whole to his children. Then it raiſed the ordinary queſtion; whether the will, being the will of a parent, was meant to be a ſatisfaction of the debt, whether by covenant or otherwiſe, to his children; and therefore it is agreed, that ſuch a will being upon the doctrine of this Court preſumed a ſatisfaction, evidence was properly admiſſible

Upon a preſumption of ſatisfaction by will evidence admiſſible: 1ſt, to conſtitute the fact, that the teſtator was debtor: 2dly, to meet or fortify the preſumption.

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ble upon two grounds: firſt to conſtitute the fact, that he was debtor: 2dly, either to meet or to fortify the preſumption, founded upon the doctrine of the Court. There is no difficulty therefore in that caſe. The queſtion is exactly the ſame as to the money received by the teſtator; if this ſchedule was made either before or after the will: with regard to that ſum, his will in this Court affording a preſumption of ſatisfaction, it would be competent to meet that preſumption by evidence, and to admit evidence to confirm it; and as to that this ſchedule undoubtedly would be evidence. I agree alſo to *Wright* v. *Rutter* and *Rutter* v. *Maclean*; where an aſſignment was made of a wife's choſe in action under circumſtances, which would not make it a valid and effectual inſtrument in this Court as between the huſband and wife: but it made that his property, till it was undone; and being ſo, *primâ facie* the will diſpoſing of this property affected it; and therefore in that inſtance alſo a caſe of election was very properly raiſed.

With reſpect to the caſe of *Pulteney* v. *Lord Darlington*, it is hardly proper at this day to obſerve upon it: as far as it is, I am not unwilling to give my aſſent to the inclination of opinion expreſſed by Lord *Roſslyn* (*a*), that it was carrying it a great way to ſay, that becauſe General *Pulteney* in his accounts had dealt with an eſtate tail, which in a very ordinary ſenſe he might think his, therefore in a will diſpoſing of his property he intended to include it, having property to an immenſe amount to anſwer the words. That caſe is a ſtrong one in that reſpect. If the deciſion turned upon that point, I muſt regard it as ſomething very like a determination, that parol evidence may be received to prove, that that is the teſtator's property, which in the ſenſe of the law is not his. I agree to it, if it goes upon a manifeſtation in the will itſelf, that he means to call that his own, which in a legal ſenſe is not his own. The will then manifeſts the intention; and then it endangers the adminiſtration of juſtice not to put the caſe upon that ground, and ſay, that is ſufficient, but to go out of the will, appreciating the effect of parol evidence; which, 1ſt, does not by any means amount to a manifeſtation of that it is ſuppoſed to manifeſt, and, next, the admiſſion of which perhaps is not to be vindicated upon any principle, that can be readily ſtated.

(*a*) *Ante*, vol. 4. 537.

As to the caſe of *Eden* v. *Smyth*, I am not ſufficiently informed upon it to ſtate, whether the evidence is admiſſible, or not. If what is ſtated in the Report as to the bond from Sir *Frederick Eden* to Mr. *Smyth*, that the paper produced would operate as a releaſe, is to be taken as Lord *Roſslyn*'s opinion, and if that opinion is right, then certainly it was properly received in evidence; and the queſtion then is only, whether that opinion is well founded. As to the bond, in which Sir *Frederick Eden* and Mr. *Smyth* were both bound, and which being paid by the father would give him an equity to call upon his ſon, the claim being only an equity, I do not know, that the evidence was not admiſſible to meet it. But as to bonds due to the teſtator from his ſon, it is very difficult to ſay, evidence is admiſſible to prove, the teſtator did not mean to make a demand upon thoſe bonds. If the evidence goes to this, that he had done any act amounting to a releaſe, then it was improper to call them bonds. But the caſe is infinitely too complicated for me to preſume to ſay, it was not rightly decided.

In this caſe, if the whole truſt property was in the ſame ſtate as the ſum of 1,385*l.* 14*s.* 3½*d.* remaining in the hands of the original debtor under the ſettlement, perhaps *Hinchcliffe* v. *Hinchcliffe* would be an authority in point for receiving the evidence; for that money in the hands of the teſtator would be expreſsly in the ſame ſituation as the money in the hands of the Biſhop of *Peterborough*; a fund to come to the hands of the truſtees by the effect of the covenant and acts of the father. But the caſe is not ſo circumſtanced; and it differs from all the caſes in theſe reſpects; that as to the manor of *Cotleigh* the legal eſtate was actually veſted by acts done in purſuance of the covenant in the children. So the money laid out in ſtock, being actually veſted in the truſtees by acts done in purſuance of the covenant was veſted in them for correſponding equitable eſtates. The queſtion then is, whether upon the circumſtances I can from this will and the ſchedule, if it is evidence, infer, that the teſtator meant to purchaſe for his eldeſt ſon the manor of *Cotleigh*, the truſt money in his own poſſeſſion, and alſo this truſt ſtock. Upon the head of ſatisfaction he has clearly purchaſed for his eldeſt ſon the money in his poſſeſſion: upon the head of election he has propoſed to his younger children the purchaſe of the manor of *Cotleigh* for his eldeſt ſon; and the queſtion is, whether the will taken altogether, attending to thoſe two circumſtances, affords ſuch a probability or preſumption, that by the words "my eſtate and effects both real and perſonal," he meant to deſcribe alſo this truſt ſtock, that upon the will itſelf, or upon this paper, taken together with what ariſes out of the will, I can ſay, he did mean to purchaſe this for the benefit of his eldeſt ſon. The ſchedule is very particular. Of neceſſity it muſt have been written after the 4th of *September* 1769; for that date appears on the face of it; and the queſtion is, if the will contains no manifeſt purpoſe to purchaſe this property by deſcribing it as his real and perſonal eſtate, whether that purpoſe can be made manifeſt in ſuch a caſe by a paper, that could not be written for above two years after the will. I was very much ſtruck with that, as applied to the ordinary caſe: but upon equities ariſing out of preſumptions I find the Court has admitted ſuch evidence. In the caſe of the executor and next of kin the preſumption is met by evidence; and it has been met by ſuch evidence as makes the obſervation in the argument ſatisfactory; that you muſt ſee, whether the teſtator ſays any thing upon the ſubject between his will and his death; for in *Clennell* v. *Lewthwaite* (*a*) there is not a ſingle declaration, upon which the executor was held not to be a truſtee, but declarations, of which the firſt was made rather more than a year after the date of the will. In one of theſe caſes ſome of the authorities are ſtated, to meet what Mr. Juſtice *Buller* intimated (*b*), that if he ſhould ſit longer in this Court, he would not permit the evidence to be read. Certainly thoſe are caſes of declaration ſubſequent to the will: but, as I read the caſes, they are caſes, in which the parol evidence of declarations or tranſactions ſubſequent to the will was parol evidence pregnant with teſtimony as to what the teſtator meant at the time he made his will. They are alſo caſes different from this in ſome reſpects. They would apply to this, if the queſtion was merely with regard to the money in the hands of the teſtator himſelf; becauſe the doctrine, that the will ſatisfies the debt, being founded upon a preſumption of intention, if you find a paper like this, ſubſequent to the will, expreſſive of that preſumption, it is evidence, not againſt the will, but in ſupport of it; and would be evidence to encounter the preſumption. But as to the manor of *Cotleigh*, which was actually purchaſed, and conveyed to the uſes of the ſettlement, and the truſt money, ac-

Evidence admitted upon equities ariſing out of preſumptions; and in the caſe of the next of kin and executor evidence between the will and the death of the teſtator, but as to his intention at the date of the will.

(*a*) *Ante*, vol. 2. 465. 644.

(*b*) *Ante*, vol. 1. 357. in *Nourſe* v. *Finch*.

tually in the hands of the truſtees upon the truſts of the ſettlement, it is not a queſtion of preſumption, but of election. This therefore is not evidence applying merely to a queſtion of preſumption; and it is to be conſidered, whether ſuch evidence is admiſſible with regard to the queſtion of election. The caſe of *Hinchcliffe* v. *Hinchcliffe* does not appear to apply to it with regard to that; for the evidence was there admitted to prove, what had become of the property; and that what had been done would make it neceſſary for the Court to conſtrue the will as affording a preſumption, that the ſettlement was not to be acted upon. That was a queſtion of ſatisfaction. I obſerve, at the end of the Report the Maſter of the Rolls ſays, he deſires to be underſtood, that the books are admitted upon the queſtion of election; upon which queſtion he takes them to be admiſſible; but not to explain the will; and he grounds himſelf in that upon what Lord Chief Juſtice *De Grey* and Baron *Eyre* are repreſented to have ſaid in *Pulteney* v. *Lord Darlington*. If the evidence was admitted to prove, as Baron *Eyre* ſays, that what he thinks his muſt be taken to be his, the evidence in that way is to all intents and purpoſes admitted to explain the will (*a*).

If therefore this caſe is to ſtand upon this ſchedule only, and the will itſelf is not pregnant with the concluſion, that the teſtator meant, that this truſt property ſhould paſs to his eldeſt ſon, I ſhould have great difficulty in admitting the evidence, in the firſt inſtance, and conſiderable, I do not ſay invincible, difficulty in ſaying, that, if admitted, it does evince, what was the intention at the time of making the will. The obſervation applies equally to the caſes of preſumption rebutted by evidence. In *Clennell* v. *Lewthwaite*, for inſtance, it proceeded from the accident, that the teſtator lived long enough to hold thoſe goſſiping converſations, that the executor held the property. The anſwer to that is, that in caſes of preſumption, that being againſt the legal title, evidence has been admitted againſt the preſumption; and the executor and next of kin run the riſk of his ſpeaking or remaining ſilent till his

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(*a*) During the argument the Lord Chancellor, with reference to the concluding paſſage of the judgment in *Hinchcliffe* v. *Hinchcliffe*, ſtated the diſtinction thus; that evidence is not received to give a different conſtruction to the words of the will; but is received to determine, whether the Court will ſay, the meaning of that will was, that the covenant ſhould be ſatisfied by the proviſion of the will.

death. If that has been applied to caſes of election, it ſeems to me to be applied upon a principle not exactly the ſame; and upon a principle, which perhaps is not very accurately applied to wills deviſing real eſtate. I now allude to *Brady* v. *Cubitt* (*a*) and thoſe caſes upon an implied revocation of a will; in which it was ſaid, evidence of declarations was admitted, becauſe it is to rebut an equity. If they mean to ſay, that parol evidence is admitted, to get the better of a preſumption, that is accurate: but it is perfectly inaccurate to ſay, that any thing like an equity is to be rebutted. The expreſſion therefore in ſome of the Reports is not ſo accurate, as it ſhould be. It is, not rebutting an equity, but anſwering a preſumption.

Upon the queſtion, whether that ſpecies of evidence, that is admiſſible to bar a preſumption, is admiſſible to raiſe a caſe of election, the authorities in the affirmative have not preſented themſelves to me; unleſs the caſes, that have been alluded to, are to be taken to be authorities. Suppoſe then this paper admitted, the queſtion is, does it ſpeak the intention at the date of the will? Even the caſes, to which I have now alluded, require that. Upon that I incline to think, that fairly taken it may be conſidered a declaration by the teſtator as to what he meant at the date of the will. This paper ſeems to demonſtrate, that he meant as to his general perſonal eſtate, what the law would ſay he meant, not only what was his perſonal eſtate at the date of the will, but what ſhould afterwards become ſo. This property was his in a certain extent. He was receiving the intereſt. Therefore upon the paper and the title of it, it is reaſonable evidence, that he would ſpeak of it as his perſonal eſtate, in the ſame manner as he ſpoke of his ſecurities as his. But if the caſe ſtood on this alone, I do not mean to ſay, whether I ſhould admit the evidence, or how I ſhould decide it. I ſhould have great difficulty upon it unqueſtionably. But upon the whole of the will taken together, though the conſtruction is not free from riſk, there is very ſtrong reaſon to ſay, the will itſelf manifeſts, that he meant, this property ſhould paſs as his perſonal eſtate. There is demonſtration upon the will, that he meant, the eſtate of *Cotleigh*, of which in point of law he was only tenant for life, with intereſts in remainder

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(*a*) *Dougl.* 30. See *Gibbons* v. *Caunt*, *ante*, vol. 4. 840. *Kenebel* v. *Scrafton*, ſtated *ante*, vol. 5. 663.

der in fee veſted in his children, ſhould paſs as real eſtate. The obſervation is juſt, that in moſt caſes of election there is an expreſs deviſe of the eſtate: but if that part of the will relating to the eſtate of *Cotleigh* is pregnant with inference, that he thought that his real eſtate, which was not ſtrictly his, having exactly correſpondent intereſts in the other ſubjects, and if he has effectually deviſed to his eldeſt ſon two of thoſe ſubjects as his real and perſonal eſtate under the head either of election or ſatisfaction, is it the better conſtruction, that by thoſe words he meant to comprehend a ſubject, in which his intereſt was preciſely the ſame, or, that he meant to exclude that? I cannot ſay, he meant to exclude it; unleſs I ſay, he meant to diſtinguiſh the third ſubject of the truſt, where there is no reaſon to make the diſtinction; and unleſs I ſay that in a caſe, in which he was providing portions and fortunes for his children; where he muſt be taken to mean to deveſt eſtates at law veſted in them, and to ſatisfy the debt he owed them; meaning to diſpoſe of what they could claim under the ſettlement; and unleſs I ſay, that the maintenance is to come out of the reſidue, in an aggregate ſum, including the manor of *Cotleigh*, and the money in his own poſſeſſion; but that the dividends of the ſtock ſhould not be touched for that purpoſe; that it ſhould be contra-diſtinguiſhed from the maſs of his perſonal eſtate; and accumulate; neither diſpoſeable for maintenance or education; and alſo, that the power of advancing the children would include the two former ſubjects, but not the laſt; and that he had a purpoſe to keep that entire, until they ſhould attain the age of twenty-one. I do not think that the true meaning of this will. I conſtrue it in the ſame way, as Mr. *Alexander* ſays the Court conſtrued the will in *Pulteney* v. *Lord Darlington*; that there is ſufficient in the will itſelf, to infer, that the intention of the teſtator was to diſpoſe of the whole as his own. If that is to be ſtated as preſumption, and not conſtruction, then this evidence might be admitted; and would very much fortify the conſtruction. It clearly may be admitted as to the money in his hands. But the queſtion turns upon conſtruction, as diſtinguiſhed from preſumption, as to the third ſubject. I have therefore ſo much doubt, whether the evidence can be admitted, that, without ſaying, whether it can, or not, I decide this upon the will; that by the will, taking the whole together, the teſtator has manifeſted, that he meant to paſs the whole of this property to his eldeſt ſon.

Under theſe circumſtances the Plaintiff muſt elect; and if he elects to take under the will, the bill muſt be diſmiſſed, but without coſts (a).

(a) Druce v. Dennifon. Poſt.

July 20.

DRURY v. MOLINS.

Injunction againſt ploughing up paſture upon a covenant to manage in a huſbandlike manner.

see Co. Litt. 53.b.

Mr. *Ainge* moved for an injunction to reſtrain a tenant from committing waſte by ploughing up paſture land. The leaſe contained no expreſs covenant not to convert paſture to arable; but there was a covenant to manage paſture in a huſband-like manner.

The Lord Chancellor ſaid, he thought that equivalent; and granted the injunction till anſwer and farther order.

July 17. 21.

THE MARQUIS TOWNSHEND v. STANGROOM.

STANGROOM v. THE MARQUIS TOWNSHEND.

Parol evidence admiſſible in oppoſition to a ſpecific performance of a written agreement upon the heads of miſtake or ſurpriſe as well as of fraud; and upon ſuch evidence the bill was diſmiſſed. Another bill for a ſpecific performance of the agreement, corrected according to the ſame evidence, contradicted by the anſwer, was alſo diſmiſſed.

Christopher Stangroom was in poſſeſſion by leaſe from the Marquis *Townſhend* of a farm in the pariſh of *Langham*, conſiſting of 446 acres, 3 roods, and 23 perch, at an annual rent of 290 *l.* *Jane Garrett* was tenant of another farm under the Marquis; and thoſe two farms compriſed all the lands belonging to the Marquis in that pariſh. About the end of the year 1796, a treaty commenced between *Spearing*, agent to the Marquis, and *Stangroom*, for a renewal of *Stangroom*'s leaſe; and an agreement, dated the 4th of *May* 1797, was ſigned by *Spearing* and *Stangroom*, entitled, "A ſtatement of the quantity of land and annual "value of the farm belonging to the Marquis *Townſhend* in "*Langham*, in the occupation of *Chriſtopher Stangroom*, as pro"poſed to be let upon a leaſe for twenty-one years from *Michael-*

1801.

The Marquis Townshend *v.* Stangroom.

“ *mas* 1797.” This agreement then ſtated the arable and paſture land particularly, by acres, roods, and perches; in all 425 A. 1 R. 26 P. “ be the ſame more or leſs;” that the rent was to be 270 *l.* a year; and expreſſed ſome other terms.

The firſt bill prayed a ſpecific performance of that agreement; charging, that about the ſame time an agreement took place with Mrs. *Garrett* for a renewal of her leaſe, compriſing alſo a part of *Stangroom*'s farm, about 24 acres; that the defendant *Stangroom* was aware of that agreement, and of the terms, upon which he was to have his own leaſe; and that the agreement with *Stangroom* contains the ſame quantity of land as a ſchedule, made out in the preſence of *Stangroom*, and with his aſſiſtance from a general map: about 24 acres being deducted from his farm, to be added to Mrs. *Garrett*'s; and 2 A. 3 R. 30 P. being taken from her's to be added to his. Notice to quit was given to both tenants on the 3d of *April* 1797.

Stangroom by his anſwer denied, that he aſſiſted *Spearing* in making out the ſchedule from the map; or, that he knew of it. He admitted a propoſal, made to him by *Spearing* about the 29th or 30th of *March*, or the 1ſt of *April*, to take from his farm about 25 acres; and that the rent for the farm he was to have ſhould be 290 *l.*; which propoſal he refuſed. He denied any knowledge of Mrs. *Garrett*'s agreement for any part of his farm, or any knowledge of any ſuch intention, except for the exchange of about eight acres; which was propoſed by *Spearing*; and to which the defendant did not object.

Spearing and another witneſs, *Hammond*, proved, that the map was the general ſtandard of the quantity of lands; and was referred to as ſuch by *Stangroom* and the other tenants; that *Stangroom*'s and Mrs. *Garrett*'s lands were then mixed; and about 24 acres of *Stangroom*'s were convenient for Mrs. *Garrett*. *Spearing* alſo proved an exhibit, the ſchedule of the farms, referred to by the bill, in his hand-writing, entitled, “ The farm in the oc“cupation of *Chriſtopher Stangroom* at *Langham*:” the two firſt ſides were written in *December* 1796 at *Stangroom*'s houſe: the third ſide written afterwards; where, the deponent does not know: but the whole written to aſcertain the quantity of land propoſed

to

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to be let to Mrs. *Garrett*; and taken from the map: the two firſt ſides made out with the privity and aſſiſtance and in the preſence of *Stangroom*; and the whole communicated to him previouſly to or at the time of the propoſal to her. The third ſide contained the 24 A. 3 R. and 7 P. propoſed to be taken from *Stangroom*, and 2 A. 3 R. 33 P. to be taken from Mrs. *Garrett*, and added to *Stangroom*'s farm. Mrs. *Garrett*'s agreement in writing was proved, according to a verbal agreement, ſtated by *Spearing*, on the 13th of *April* 1797, for a leaſe for 14 years of 14 ſcore acres, at a rent of 170 *l.* He ſtated, that *Stangroom* had notice of the verbal agreement. *Hammond* alſo proved, that he informed *Stangroom* of her verbal propoſal; and that her written propoſals were ſhewn to him: and a paper was produced in the hand-writing of *Stangroom*, and delivered by him to *Hammond*, at the end of *March* 1797, to be delivered to Mrs. *Garrett*; ſtating looſely the extent of Mrs. *Garrett*'s farm; and that ſhe was to have about 20 acres more, and calculating the rent ſhe was to pay, upon the footing of her verbal agreement. *Spearing* on his croſs examination denied, that he propoſed an exchange of eight acres only; as ſtated by the anſwer.

The Croſs bill prayed a ſpecific performance of the written agreement.

Mr. *Lloyd*, Mr. *Romilly*, and Mr. *Johnſon*, for *Stangroom* objected to the admiſſion of evidence.

There is no inſtance, in which an agreement has been varied by parol evidence of converſations. This is not put upon the ground of fraud or miſrepreſentation. *Lord Irnham* v. *Child* (*a*), *Hare* v. *Shearwood* (*b*), *Lord Portmore* v. *Morris* (*c*), *Rich* v. *Jackſon* (*d*), *Gunnis* v. *Erhart* (*e*), *Meres* v. *Anſell* (*f*). In *Jenkinſon* v. *Pepys*, in the Exchequer, upon the ſale of an eſtate by auction, the particular was equivocal as to the woods: but it was clear, the purchaſer was to pay for timber and timber-like trees. There was a large underwood upon the eſtate. At the ſale, the article being ambiguous, the auctioneer declared, he was only to ſell the

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(*a*) 1 *Bro. C. C.* 92. (*b*) *Ante*, vol. 1. 241. 3 *Bro. C. C.* 168.
(*c*) 2 *Bro. C. C.* 219. (*d*) 4 *Bro. C. C.* 514. (*e*) 1 *H. Black.* 289.
(*f*) 3 *Wilſ.* 275.

land;

land; and every thing growing upon the land muſt be paid for. The defendant, the purchaſer, inſiſted, he was only to pay for timber and timber-like trees, not for plantation and underwood. The declaration at the ſale was diſtinctly proved: but it was determined, that the parol evidence was not admiſſible. In this caſe all this was treaty antecedent to the execution. To proceed upon the evidence would put an end to the ſtatute (*a*).

Mr. Manſfield, Mr. Richards, Mr. Fonblanque, and Mr. Horne, for the Marquis Townſhend—This is the caſe of a latent ambiguity, requiring explanation *aliunde*. Each party deſires the aſſiſtance of the Court. In *Baker* v. *Paine* (*b*) the evidence was admitted; certainly in a caſe of miſtake. Surpriſe and miſtake come very near fraud. If *Stangroom* is permitted to hold this land, intended to form part of Mrs. *Garrett*'s farm, and made ſo by the agreement with her, the effect will be fraud. *Joynes* v. *Statham* (*c*) is deciſive; and according to the eſtabliſhed doctrine, that if the Court can be ſatisfactorily informed, that the agreement is not ſuch as the party thought it was, it ſhall not be enforced.

The evidence was read without prejudice. The caſe was then argued upon the effect of the agreement and the evidence: the plaintiff in the original cauſe contending, that the agreement clearly referred to the quantity of land by acres, roods, and perches; and the words "be the ſame more or leſs" meant only, that they did not warrant the meaſure; and the deſcription of lands in the occupation of *Stangroom* was ſatisfied, with that reſtriction; and did not neceſſarily mean all the lands in his occupation; and that it would be impoſſible to enforce *Stangroom*'s agreement literally, particularly againſt Mrs. *Garrett*.

For the plaintiff in the Croſs bill it was inſiſted, that there was no ambiguity in the agreement. The farm in the occupation of *Stangroom* was intended to be let. The words "be the ſame more or leſs" ſhewed, the parties meant to be bound by the deſcription of the perſon, not of the quantity of land. Thoſe

(*a*) 29 *Cha.* 2. *c.* 3. (*b*) 1 *Veſ.* 456. (*c*) 3 *Atk.* 388.

words muſt refer to all the preceding items; and might anſwer 20 acres; as they would without doubt a leſs quantity; though not, if it was conſiderable. Upon the other conſtruction thoſe words are uſeleſs. The treaty was completely at an end by the notice to quit. The evidence does not amount to the aſſertion, that *Stangroom* ever agreed; and all the converſations were antecedent to the date of the agreement.

Lord Chancellor—The argument of theſe cauſes certainly furniſhes queſtions of great importance, as well as ſome difficulty. It is contended by the original bill, that it is competent to the Court to make a decree againſt *Stangroom* upon all the circumſtances and the written paper. He inſiſts by his Croſs bill, that he is not bound to execute ſuch an agreement: or rather, that it is not the true ſenſe of the agreement; that he has an agreement in his poſſeſſion, entitling him to a leaſe for twenty-one years of all the lands in his occupation; ſtating the true meaning to be a leaſe of his old farm; and, that agreement being obtained without fraud, no evidence is to be admitted to vary the ſenſe of it; and that upon no other principle than that founded upon the rules of evidence in this Court, as applying to the circumſtances and his conduct can the Court look at the parol evidence, even for the purpoſe of refuſing him a ſpecific performance of his contract: much more ſtrongly contending, that the Court cannot enforce againſt him a contract, the ſubject of which will not correſpond with the deſcription, being only a part of it; and attempting to add another property; which upon no practicable conſtruction of any words in the written agreement can be ſaid to be comprehended in it.

Upon the queſtion as to admitting parol evidence, it is perhaps impoſſible to reconcile all the caſes. *Lord Irnham* v. *Child* went upon an indiſputably clear principle; that the parties did not mean to inſert in the agreement a proviſion for redemption; becauſe they were all of one mind, that it would be uſurious; and they deſired the Court, not to do what they intended, for the inſertion of that proviſion was directly contrary to their intention, but they deſired to be put in the ſame ſituation, as if they had been better informed, and conſequently had a contrary intention. The anſwer is, they admit, it was not to be in the deed; and why was the Court to inſert it; where two riſks had occurred to the parties: the danger of uſury, and the danger of truſting to the honour of the party. The ſame doctrine was laid down in *Lord Portmore* v. *Morris*, and in *Hare* v. *Shearwood* by Mr. Juſtice *Buller*; and, ſpeaking with all the veneration and reſpect due to ſo great a judicial character, the point, in which it ſeems to have failed, is, that he thought too confidently, that he underſtood all the doctrine of a Court of Equity. It cannot be ſaid, that becauſe the legal import of a written agreement cannot be varied by parol evidence, intended to give it another ſenſe, therefore in equity, when once the Court is in poſſeſſion of the legal ſenſe, there is nothing more to inquire into. Fraud is a diſtinct caſe, and perhaps more examinable at law: but all the doctrine of the Court as to caſes of unconſcionable agreements, hard agreements, agreements entered into by miſtake or ſurpriſe, which therefore the Court will not execute, muſt be ſtruck out, if it is true, that, becauſe parol evidence ſhould not be admitted at Law, therefore it ſhall not be admitted in Equity, upon the queſtion, whether, admitting the agreement to be ſuch as at Law it is ſaid to be, the party ſhall have a ſpecific execution, or be left to that Court, in which, it is admitted, parol evidence cannot be introduced. A very ſmall reſearch into the caſes will ſhew general indications by Judges in Equity, that that has not been ſuppoſed to be the Law of this Court. In *Henkle* v. *The Royal Exchange Aſſurance Company* (a), the Court did not rectify the Policy of inſurance: but they did not refuſe to do ſo upon a notion, that, ſuch being the legal effect of it, therefore this Court could not interfere; and Lord *Hardwicke* ſays expreſsly, there is no doubt, the Court has juriſdiction to relieve in reſpect of a plain miſtake in contracts in writing as well as againſt frauds in contracts; ſo that, if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified. This is looſe in one ſenſe; leaving it to every Judge to ſay, whether the proof is that proper proof, that ought to ſatiſfy him; and every Judge, who ſits here any time, muſt miſcarry in ſome of the caſes, when acting upon ſuch a principle. Lord *Hardwicke* ſaying, the proof ought to be the ſtrongeſt poſſible, leaves a weighty caution to future Judges. This inconvenience belongs to the adminiſtration of juſtice: that the minds of different men will differ upon the reſult of the evidence; which may lead to different deciſions upon the ſame caſe. In *Lady Shelburne* v. *Lord Inchiquin* (*a*) it is clear, Lord *Thurlow* was influenced by this, as the doctrine of the Court; ſaying (*b*), it was impoſſible to refuſe, as incompetent, parol evidence, which goes to prove, that the words taken down in writing were contrary to the concurrent intention of all parties: but he alſo thought, it was to be of the higheſt nature; for he adds, that it muſt be irrefragable evidence. He therefore ſeems to ſay, that the proof muſt ſatisfy the Court, what was the concurrent intention of all parties; and it muſt never be forgot, to what extent the defendant, one of the parties, admits or denies the intention. Lord *Thurlow* ſaying, the evidence muſt be ſtrong, and admitting the difficulty of finding ſuch evidence, ſays, he does not think, it can be rejected as incompetent.

(a) 1 *Vez.* 317.

I do not go through all the caſes; as they are all referred to in one or two of the laſt. In *Rich* v. *Jackſon* (*c*) there is a reference

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(*a*) 1 *Bro. C. C.* 338. (*b*) 1 *Bro. C. C.* 341.

(*c*) The Lord Chancellor referred to the following note of the Judgment in that caſe; which is rather more full than the Report.

26th *February* 1794.

Lord Chancellor.—In this caſe I have found myſelf upon two different occaſions, where it has come before me, in that difficulty, into which a Judge will always bring himſelf, when his curioſity or ſome better motive diſpoſes him to know more of a cauſe, than judicially he ought. Upon the evidence, which I took at the trial in order to bring this caſe before the Court of Law, I gave credit to the veracity of the witneſſes; and believing them it is impoſſible to doubt, that the ſtate of the tranſaction is, as the plaintiff has repreſented it; that in the agreement the terms, upon which they treated, in the underſtanding and reaſoning of the parties were, that the rent ſhould be a net rent without any deduction. But the parties, whatever their communication had been, had executed the matter by ſigning a written agreement. The conſtruction of that agreement it is impoſſible to doubt. It is a leaſe for twenty-one years at a rent of eighty guineas, to be paid twenty guineas quarterly. The execution of that undoubtedly is, that the tenant paying the rent pays twenty guineas, ſo much in money, and his land tax receipt making up the twenty guineas. That being the certain, clear, effect of the inſtrument makes the whole of the contract upon the condition of that letting. The prior converſations and the manner of drawing it up by one party and ſigning it by another can have no influence. The real queſtion is, whether in this Court any more than at Law, where the Judges have ſaid, I ought not to have admitted the evidence, and I approve their determination, it ought to be admitted; whether there is any diſtinction in a Court of Equity, where a party comes to enforce a written agreement by obtaining a more formal inſtrument, and to add in doing that a term not expreſſed in the written agreement, and rence to *Joynes* v. *Statham*, and a note of that caſe preſerved in Lord *Hardwicke*'s manuſcript. He ſtates the propoſition in the very

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and of ſuch a nature, as to bear againſt the written agreement. I have looked into all the caſes; and I cannot find, that this Court has ever taken upon itſelf in executing a written agreement by a ſpecific performance to add to it by any circumſtance, that parol evidence could introduce: but it has often with great propriety, where an attempt has been made to obtain by a decree of this Court a farther ſecurity or more ample intereſt, than the party was in poſſeſſion of by the paper itſelf, refuſed, if it appeared, the demand was fraudulent or unfair.

The caſe of *Joynes* v. *Statham* was relied on. That was a caſe, where parol evidence was admitted on behalf of the defendant; who by that evidence ſhewed, that the plaintiff had taken an unfair advantage of the evident ignorance of the defendant, and drawn an agreement for him in terms ſimilar to that in this caſe, in which the ſame circumſtances occurred. The defendant ſet out, that his rent was to be a clear rent without any deduction. Lord *Hardwicke* admitted him to rebut the equity, and ſpecifically to ſhew that caſe by parol evidence. I looked into Lord *Hardwicke*'s own note book upon it. It is very ſhort; not above two or three lines. He mentions *Walker* v. *Walker* (*a*), that was cited to him; a deciſion of his own; and then he makes this entry:

" Decree ſpecific performance upon the terms ſubmitted to by the anſwer; the plain-
" tiff rather chooſing this than to have his bill diſmiſſed with coſts."

The reſult of his opinion therefore was to have diſmiſſed the bill with coſts. Giving the plaintiff a decree for a ſpecific performance was not making a decree upon the evidence, but upon the ſubmiſſion of the plaintiff and of the defendant in his anſwer to execute a leaſe upon the fair terms.

In *Walker* v. *Walker* the point was exactly the ſame. The bill was to ſubſtantiate a charge upon a copyhold eſtate ſurrendered by *John Walker*, the eldeſt brother of both parties, to *Ralph Walker*. It was an abſolute ſurrender, upon condition, that he ſhould pay out of the eſtate annuities of 5 *l.* to a brother and of 40*s.* to a ſiſter. The charge was ineffectual at law. They attempted to recover the annuities there, and could not. Then they came into equity to make good theſe charges, which they could not at law. Two defences were ſet up. One is not mentioned in *Atkins*, and was not material. The other was, that *John Walker* was dying at the time; that in the communication, he had with the family, he made this arrangement; that he would ſurrender that copyhold to *Ralph*, who would be his heir, and that he ſhould pay theſe annuities to *Thomas Walker* the brother and to the ſiſter; and *Thomas* was to ſurrender to *Ralph* ſubject to his own life another copyhold, which he had. The evidence proved it to demonſtration; and that it was a promiſe, when the inſtructions were given for ſurrendering the firſt copyhold, that *Thomas* would ſurrender his. The ſurrender of the other was firſt perfected; and then *Thomas* ſaid; " I admit, I promiſed: but I have got *John* faſt; " and am not bound." Then he applied for the annuity. They ſaid, he ſhould have the annuity, when he would perform the condition. The caſes quoted were from *Vernon*, where a teſtator had been prevented from altering his will by the undertaking of the party to do what the teſtator would have compelled him to do but for that undertaking. In the objection taken I obſerve, (you do not often find great reaſoning in

(*a*) 2 *Atk.* 98.

very terms; that he ſhall not confine the evidence to fraud; that it is admiſſible to miſtake and ſurpriſe; and it is very ſingular, if the

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Lord *Hardwicke's* notes, but generally a ſhort anſwer) the Counſel ſays, it was to eſtabliſh an agreement: "no," ſays Lord *Hardwicke*, "it was to rebut an equity." The other defence ſet up was diſhoneſt. The reſult was, Lord *Hardwicke* diſmiſſed the bill, praying the eſtabliſhment of the equitable charge, but without coſts, upon the ſpecial ground, that the defendant had ſet up another defence in his anſwer, which he knew to be perfectly falſe.

Parol evidence admiſſible to rebut an equity.

Legal v. *Millar* (*a*) is not the ſame ſort of caſe: but it runs upon the ſame ground. There the bill was diſmiſſed. It was brought to eſtabliſh an agreement for a leaſe of a houſe. The agreement was in writing; that in conſideration of the defendant's repairing the houſe, which by the paper he agreed to do, the plaintiff ſhould take a leaſe at a rent of 30*l*. a year. After execution it turned out, that the houſe could not be repaired; and that it would be better to rebuild it; and a fact took place, that as between the parties deſtroyed the agreement; for it was rebuilt by mutual conſent; and a new agreement was made by parol for a rent of 40*l*. The plaintiff afterwards thought proper to bring the bill to have the leaſe at the rent firſt agreed on in conſideration of repairing. Sir *John Strange* had no difficulty to admit the evidence of the latter agreement; for it was an independent, ſubſtantive, collateral, agreement after the original agreement was *rebus ipſis et factis* totally at an end: but he diſmiſſed the bill; becauſe it was a bill without any equity or good conſcience.

Pitcairn v. *Ogbourne* (*b*) is not applicable. The objection there was taken to the competency of the evidence. I wonder at it; for the real objection was to the relevancy. It was a ſecret, fraudulent, and collateral, agreement, that a bond, which appeared to be for the payment of 150*l*. a year, ſhould be but for 100*l*. The other ſum was held out as a blind to the uncle of the lady; from whom ſhe had great expectations. Sir *John Strange* read the evidence; and then he found, he was doing nothing; for after reading it, it proved only a fraudulent agreement, which could not prevail: but the objection points not to the competency of the evidence, explanatory of the agreement: but it was a defeaſance collateral, and independent, and made at another time. *Baker* v. *Paine* (*c*) has no reference to this queſtion. There was a great deal of evidence; which was properly admitted; becauſe the bill was upon this ground. The parties had entered into a minute of an agreement between them. After execution of it they had given it to an attorney to be drawn up; and the agreement, he drew up, varied from the minute, and moſt materially, in conſequence of his ignorance of the tranſaction between the parties. It was between the captain of an *India* ſhip, entitled to his privilege to the amount of 1,500*l*., and the defendant. He ſold his goods in a lump to the defendant; and in the tranſaction they made a computation of what the amount of his privilege might be, and what would be the amount of the deductions, in the whole 46½ *per cent*. upon the ſuppoſed price. Annexed to this computation they made a minute of the agreement; and in that it was mentioned, that the 46½ *per cent*. was to be deducted on the above mentioned account. They gave this minute to the attorney; and he made the deduction of 46½ *per cent*. to be upon the amount of the *bargained premiſes*; uſing a phraſe, that did not apply to it at all. The goods conſiſted of *China* ware. It happened by the *China* ſhips miſſing their voyage, that the captain's goods ſold for

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(*a*) 2 *Veſ*. 299. (*b*) 2 *Veſ*. 375. (*c*) 1 *Veſ*. 456.

4,000*l*.;

the Court will take a moral juriſdiction at all, that it ſhould not be capable of being applied to thoſe caſes; for in a moral view there is very little difference between calling for the execution of an agreement obtained by fraud, which creates a ſurpriſe upon the other party, and deſiring the execution of an agreement, which can be demonſtrated to have been obtained by ſurpriſe. It is impoſſible to read the report of *Joynes* v. *Statham*, and conceive Lord *Hardwicke* to have been of opinion, that evidence is not

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4,000*l.*; upon which the purchaſer ſaid, "I have overpaid you; you are my debtor "in reſpect of the deduction of 46½ *per cent.*, which you are to anſwer." The obvious conſequence was, that it was an impoſſible tranſaction; for the more the goods ſold for, the leſs the ſeller was to get. The evidence was that of *India* captains and brokers as to the uſage of the trade. Lord *Hardwicke* heard it all, very properly. The minute of the agreement was very ſhort; and referred to accounts; and related to tranſactions in trade. It was to be explained by the courſe of that trade and the manner of dealing; and the final reſult was to rectify the blunder by the minute. Lord *Hardwicke*'s note adds, the parties afterwards ſettled it by conſent.

Filmer v. *Gott* (*a*) is referred to in the caſe in the *Term Reports* (*b*). That laſt caſe does not refer to this in the leaſt. There the *Quarter Seſſions* held the four guineas paid towards the expence of the fine to be part of the conſideration of the conveyance; and the Court of *King's Bench* affirmed their order. In *Filmer* v. *Gott* the evidence was not to contradict the deed; but to ſhew, that it was obtained by fraud and upon a falſe conſideration; which is one of the ingredients of the fraud.

It would be difficult to find more caſes than thoſe cited, that are ſtrictly applicable. None go farther than this in the deciſions and rules laid down; that parol evidence of the conduct of the parties, the manner of conducting the tranſaction, the unfairneſs and hardſhip, may afford a good ground to leave the party in the condition, in which he put himſelf at law, to make what he chooſes to make of it; but ought not to make this Court give him any aid. If the defendant had not got by this paper what would be a ſecurity at law, and had applied to me, and the caſe was reverſed as to the ſituation of the parties, I would not put the defendant in a better condition, than that paper had put her in. It is impoſſible to admit any deviation from the rule at law. That confines the whole to the written agreement; and does not admit that to be varied by any evidence of the converſation or conduct of the parties. That rule will not affect the caſe of a ſubſequent, diſtinct, collateral, agreement; but the evidence, which I have heard, and ought not to have heard in this caſe, is evidence of what paſſed at the time of, and prior to, the written agreement. The leaſe muſt be according to the written agreement. I ſuppoſe, the plaintiff would not wiſh for a leaſe according to that.

The rule, that a written agreement within the Statute of Frauds cannot be varied by parol, does not affect a ſubſequent, diſtinct, collateral, agreement.

(The plaintiff declined to execute ſuch a leaſe.)

Lord Chancellor—I muſt therefore diſmiſs the bill: but I will not diſmiſs it with coſts.

(*a*) 7 *Bro. P. C.* 70.

(*b*) *The King* v. *The Inhabitants of Scammonden*, 3 *Term Rep. B. R.* 474.

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admiſſible in ſuch caſes; though I agree with Lord *Roſslyn*, that the report is inaccurate Lord *Roſslyn* expreſsly takes the diſtinction between a perſon coming into this Court, deſiring, that a new term ſhall be introduced into an agreement, and a perſon admitting the agreement, but reſiſting the execution of it by making out a caſe of ſurpriſe. If that is made out, the Court will not ſay, the agreement has a different meaning from that, which is put upon it; but ſuppoſing it to have that meaning, under all the circumſtances it is not ſo much of courſe, that this Court will ſpecifically execute it. The Court muſt be ſatisfied, that under all the circumſtances it is equitable to give more relief than the plaintiff can have at law; and that was carried to a great extent in *Twining* v. *Morrice* (*a*). In that caſe it was impoſſible to impute fraud, miſtake, or negligence: but Lord *Kenyon* was ſatisfied, the agreement was obtained by ſurpriſe upon third perſons; which therefore it was unconſcientious to execute againſt the other party intereſted in the queſtion. It had been decided frequently at law, that there could be no ſuch thing as a puffer at an auction. That, whether right or wrong, has been much diſputed here (*b*). In that caſe we contended, that all the parties in the room ought to know the law. Lord *Kenyon* would not hear us upon that; and I do not much wonder at it: but *Blake* being the common acquaintance of both parties, and having no purpoſe to bid for the vendor, unfortunately was employed to bid for the vendee; and others, knowing, that he was generally employed for the vendor, thought, the bidding was for him. Lord *Kenyon* ſaid, that was ſuch a ſurpriſe upon the tranſaction of the ſale, that he would leave the parties to law; and yet it was impoſſible to ſay, that the vendee appointing his friend, without the leaſt notion, much leſs intention, that the ſale ſhould be prejudiced, was fraud, ſurpriſe, or any thing, that could be characteriſed as morally wrong. That caſe illuſtrates the principle, that circumſtances of that ſort would prevent a ſpecific performance; and that it is competent to this Court, at leaſt for the purpoſe of enabling it to determine, whether it will ſpecifically execute an agreement, to receive evidence of the circumſtances, under which it was obtained; and I will not ſay, there are not caſes, in which it may be received, to enable the Court to rectify a written agreement,

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(*a*) 2 *Bro. C. C.* 326.

(*b*) *Conolly* v. *Parſons*, *ante*, vol. 3. 625. *note*.

upon ſurpriſe and miſtake, as well as fraud: proper, irrefragable, evidence, as clearly ſatisfactory, that there has been miſtake or ſurpriſe, as in the other caſe, that there has been fraud. I agree, thoſe producing evidence of miſtake or ſurpriſe, either to rectify an agreement, or calling upon the Court to refuſe a ſpecific performance, undertake a caſe of great difficulty: but it does not follow, that it is therefore incompetent to prove the actual exiſtence of it by evidence.

The concluſion upon this caſe is, that I can give relief upon neither bill. I will not ſay, that upon the evidence without the anſwer I ſhould not have had ſo much doubt, whether I ought not to rectify the agreement, upon which *Stangroom* relies, as to take more time to conſider, whether the bill ſhould be diſmiſſed. But the evidence muſt be taken, due regard being had to the anſwer; and the Court is not to decide upon the allegation as to the probability againſt the anſwer, not only to take out of his contract part of the land he held, but to inſert land, which he never did hold, and of which he ſtates he never did agree to become the occupier. Though I admit all the obſervation upon the depoſitions, ſtating the communication to *Stangroom* by *Spearing* of the third ſide of the paper, produced in evidence, it is clear upon all the other circumſtances, that *Stangroom* knew prior to that agreement, that there had been treaty with Mrs. *Garrett* to let her have the land deſcribed in the third ſide of that paper. A moſt material fact is, that *Stangroom* admits, that upon the 29th or 30th of *March*, or the 1ſt of *April*, *Spearing* propoſed to him, that his farm ſhould be varied. It is ſaid, he objected to that propoſition: but he admits, that at that time *Spearing* delivered to him a paper, which correſponds in moſt, if not all, its parts with the agreement of the 4th of *May*. If that paper amounts to a propoſition, that he was not to have his old farm, and it correſponds with the paper of the 4th of *May*, and *Spearing* executed that paper with the notion, that it demiſed, what he propoſed to demiſe upon the 29th or 30th of *March*, or the 1ſt of *April*, the other taking it as not demiſing what was propoſed at the prior time, there cannot be a ſtronger caſe of ſurpriſe; with this additional fact, that before the execution of the agreement Mrs. *Garrett* repreſented, that the bargain propoſed to her was hard. She was to have more lands in this pariſh. Where was

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ſhe to get more, but out of the occupation of *Stangroom*; all the lands in that pariſh being let between them? He ſends her word, that ſhe is to have the additional quantity. What is that but ſaying, that he was to give up ſo much; for it could be procured from no other quarter? Recollecting alſo, that the map was in his poſſeſſion, was referred to, and was ſomething to amend by, that it gave map quantities, and the papers were reformed as to their quantities by that map, furniſhing 446 acres, as the quantity in the poſſeſſion of *Stangroom*, and 425, as the quantity propoſed to be in his poſſeſſion, the latter made up by reduction of 24 acres and the addition of three, it is impoſſible, taking all this together, to prove, that it was the intention of the parties, that if thoſe two treaties were carried into effect, he ſhould have the whole. It appears, that *Spearing* managing for his landlord, and theſe tenants doing the beſt for themſelves, had not come to an agreement up to the 1ſt of *April*. Then notice to quit was given to both. That is ſaid to be a determination of all treaty. It is put on the other ſide as ſpeeding the buſineſs. Steps are taken directly; and Mrs. *Garrett* makes her agreement by parol upon the 13th of *April*; the effect of which is to give her the benefit of that part of the treaty, which was to take from *Stangroom* that part of his farm. That agreement was communicated to *Stangroom*. He knew, ſhe had a parol agreement, perhaps not ſtrictly one, that, even if confeſſed, would have bound, but an agreement, that in all honour, conſcience, and fair dealing, ought to bind; ſhe relying upon the honour of her landlord, that ſhe was to have that property in her occupation, which *Stangroom* himſelf had adviſed her to take. The ſubſequent agreement with *Stangroom* does away the effect of the notice to quit.

The queſtion therefore is, whether upon the face of the agreement connected with a latent circumſtance, now diſcloſed, you are not at liberty upon the latent fact diſcloſed to inquire into the nature of the agreement itſelf; if there is ſomething upon the face of it inconſiſtent with that fact diſcloſed: whether evidence can be admitted upon the ground of that fact diſcloſed; one part of the agreement importing what the other part does not import: next, whether if *Stangroom* really underſtood, he was to have the whole of his old farm, he ſhall have a ſpecific execution; if the other party could not ſo underſtand it. As to the expreſſion "more or leſs," I do not ſay, thoſe words in a contract will not include a few additional acres: but if the parties are contending about three acres, it would be very ſingular upon thoſe words to add 24 map acres; which he knew were already demiſed, as far as parol could demiſe them, to Mrs. *Garrett*. It is almoſt impoſſible, that he could mean to include them. Therefore upon the head of the true meaning of the agreement, I think the parol evidence may be introduced: but, without determining that, the evidence is ſo complete to ſhew, *Spearing* did not mean it at the time of the agreement, and that *Stangroom* muſt have known, that he could not mean it, that he is therefore to be left to law.

As to the other part of the caſe, I cannot poſſibly execute an agreement ſo perfectly different from that *Stangroom* has ſigned. I am to conſider it with reference to his anſwer; by which he has poſitively denied it. The whole agreement is to be taken together; and the whole muſt be executed or abandoned. I cannot find out, what was the parcel of land in the poſſeſſion of Mrs. *Garrett*, that he was to have. It is not diſtinctly ſtated: nor is it admitted. I cannot therefore give a ſpecific performance upon that bill; and under all the circumſtances with regard to the admiſſion of evidence, attending to the purpoſe and the view, with which it is to be admitted in this Court, both bills muſt be diſmiſſed, without coſts, on account of the inaccuracy of all the tranſactions (*a*).

(*a*) *Wollam* v. *Hearn*. *Poſt*.

WEDDELL *v.* MUNDY.

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William Hooper by his will, after giving ſome annuities, gave to truſtees 1,000*l.*; upon truſt to place that ſum out at intereſt, and the dividends and intereſt to pay towards the ſupport, and maintenance, and education, of his daughter *Mary Hooper* for and during the term of her natural life; as the truſtees ſhould think proper; and after her deceaſe to pay and transfer the principal to the lawful huſband of his ſaid daughter, if ſhe ſhall happen

Bequeſt to *A.*, her executors, &c. provided, that in caſe ſhe ſhall die under twenty-one or without leaving any huſband living at her death, it ſhall go over, veſted at twenty-one upon the intention: the word "or" being conſtrued "and."

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to leave any behind her at the time of her deceaſe; which ſaid ſum of 1,000 *l.* together with the ſaid ſecurities ſhe thereby gave and bequeathed to him accordingly; provided his ſaid daughter ſhall not leave any lawful iſſue of her body living at the time: but if ſhe ſhall happen to leave any ſuch, then he declared his will, and gave and bequeathed the ſaid principal ſum of 1,000 *l.* to and among all and every ſuch his grand-children equally between them ſhare and ſhare alike, to be paid to them reſpectively upon their reſpectively attaining their ages of twenty-one years; and if any or either die under that age, he gave the ſhare or ſhares of him, her, or them, ſo dying equally between the ſurvivors; and if there ſhould be only one, to that one. He alſo gave and bequeathed to his ſaid daughter all the reſt, reſidue, and remainder, of his perſonal eſtate, of what kind ſoever, to hold to her, her executors, adminiſtrators, and aſſigns, for ever: provided always, and he declared, his will was, that in caſe his ſaid daughter ſhall happen to die under the age of twenty-one years, or without leaving any lawful huſband living at the time of her death, then he gave to his father-in-law and ſeveral other perſons ſeveral legacies; all which he directs to be paid within twelve calendar months next after his deceaſe in caſe of the death of his ſaid daughter under age, as aforeſaid; and in ſuch caſe he did thereby give and bequeath all the reſt, reſidue, and remainder, of his perſonal eſtate and effects, whatſoever and whereſoever unto his two nephews equally; and he appointed his truſtees executors; and gave them legacies.

After the death of the teſtator *Mary Weddell*, his only child, having attained the age of twenty-one, and married, filed the bill with her huſband; and the queſtion was upon the right of the plaintiffs under the reſiduary clauſe.

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Bequeſt to *A.*, her executors, &c. provided, that in caſe ſhe ſhall die under twenty-one or without leaving any huſband living at her death; it ſhall be conſtrued "and."

The Solicitor General and Mr. Leach for the plaintiffs—The queſtion is, whether this intereſt is veſted, the plaintiff having attained the age of twenty-one, or ſtill contingent, depending on another event, whether ſhe ſhall leave a huſband living at the time of her death. The teſtator intended only one event, conſiſting of two circumſtances; and the word "or" muſt be conſtrued "and." The ſubſequent clauſe, directing payment of the legacies within twelve months after the teſtator's deceaſe in caſe of the death of his ſaid daughter under age, as aforeſaid, and in ſuch caſe giving the reſidue to his nephews, ſhews that intention; not referring to either of two events. This makes the caſe infinitely ſtronger than the former caſes, in which the word "and" has been ſubſtituted for "or." Upon the other conſtruction, if ſhe ſhould leave children, but no huſband, this property would go over.

Mr. Richards and Mr. Raynsford for the defendants—This will, though very inaccurate, expreſſes two contingencies. The diſpoſition of the 1,000 *l.* muſt be coupled with that of the reſidue. In the event of her death without huſband or children, that ſum of 1,000 *l.* would fall into the reſidue; and the defendants would take it as part of the reſidue; which ſhe never could.

The Maſter of the Rolls—After the teſtator has given the reſidue of his perſonal eſtate to his daughter in words, that would veſt it abſolutely in her, he is ſuppoſed to take it away from her by words, which would prevent it from ever veſting in her. The plaintiff's conſtruction is the only one; and makes the two parts conſiſtent. The expreſſion "under age, as *aforeſaid*" means, not leaving a huſband; and in that paſſage he ſeems to have contemplated her death in his life. There can be no doubt he meant "and" by "or;" and caſes are not neceſſary for that conſtruction; if you can make out the intention (*a*).

Decree according to the prayer of the bill.

(*a*) *Maberly* v. *Strode*, *ante*, vol. 3. 450. and the references in the note, 452.

ABBOTT *v.* ABBOTT.

Rolls. *July* 21.

Executor held a truſtee for the next of kin of the reſidue undiſpoſed of upon a legacy, againſt an argument upon the will oppoſing the preſumption.

JAMES ABBOTT by his will diſpoſed in the following manner:

"To *William Abbott* my eldeſt brother I give 10 *l.* as a legacy, and to his four children 10 *l.* each; and to *Stephen Abbott* 10 *l.* to him as a legacy; and to his three ſons 10 *l.* each; and to *John Abbott* deceaſed his four children, three ſons, 10 *l.* each, and to his daughter *Hannah Lumley* 20 *l.*; and to my ſiſter *Sa-*

" *rah Nickles*, only daughter of *Elizabeth Nickles*, 20 *l.*; and to
" my brother *Thomas Abbott* 10 *l.*; and to his only daughter 20*l.*;
" and the annuity of the three Miſs *Vaughans* of *Suffolk* Street,
" *Middleſex* Hoſpital, to my ſiſter *Mary Ellington*: ſhe to have it for
" her natural life; and her huſband *William Ellington* not to have
" any thing to do with it: but to be at her diſpoſal; and after
" her death to be divided among the ſurvivors and added to the
" annuity 130 *l.* during her natural life; and the ſaid *William*
" *Ellington* to have 5 *l.* for mourning; and to my brother *Samuel*
" *Abbott* 20 *l.*; and to my brother *Joſeph Abbott* of *Froom* 10 *l.*;
" and " to five perſons by name" one guinea each for a ring; and
" to my nephew *James Abbott* whole and ſole executor."

The only queſtion was, whether the defendant *James Abbott*, the executor, who was one of the children of *William Abbott*, was entitled to the reſidue beneficially, or was a truſtee for the next of kin.

Mr. Richards and Mr. Stanley for the plaintiffs. Mr. Romilly and Mr. Hall for the defendant contended, that this amounted to giving him the executorſhip.

The Maſter of the Rolls ſuggeſted, that the conſtruction of the laſt clauſe might be to give him a guinea for a ring.

Mr. *Romilly* ſaid, that conſtruction would not be conſiſtent with the manner, in which all the other legacies were given; in which the perſon preceded the ſum.

The Maſter of the Rolls (after ſome farther diſcuſſion at the bar) ſaid, it would be too much in ſuch a caſe to give the defendant the reſidue beneficially; and declared him a truſtee for the next of kin (*a*).

(*a*) *Niſbett* v. *Murray*, *ante*, vol. 5. 149. and the references in the note, 158.

BARRINGTON *v.* TRISTRAM.

July 17. 22.

A bequeſt for all and every the child and children of *A.* includes every child born before the period of diſtribution; which in this caſe was the attainment of the age of twenty-one by the eldeſt, the marriage of a daughter, or the death of a child under twenty-one, leaving iſſue. Upon the general rule a child by a ſubſequent marriage was included, notwithſtanding a ſtrong implication in favour of children by the prior marriage.

ADMIRAL *Barrington* by his will, dated the 22d of *February* 1797, after deviſing his real eſtate, and diſpoſing of a leaſe-old houſe, and the furniture, *&c.*, gave and bequeathed to his ephew *Barrington Price* 10,000 *l.* 3 *per cent.* Conſolidated Bank Annuities, part of his ſtock in that fund; which he directed to be ransferred to his ſaid nephew for his own uſe and benefit within one month after the teſtator's deceaſe: but if his ſaid nephew hould happen to die in his lifetime, then the teſtator directed, that is executor ſhould ſtand poſſeſſed of the ſaid 10,000 *l.* 3 *per cent.* Bank Annuities upon truſt for all the children of his ſaid nephew *Barrington Price* lawfully begotten, which ſhall be living at his deceaſe, or born in due time afterwards, in equal ſhares, if more han one; to be transferred to a ſon or ſons at the age of twenty-one, and to a daughter or daughters at the like age, or marriage with conſent of the executor; the dividends to be in the mean ime applied for maintenance and education; with ſurvivorſhip in caſe of the death of any one or more dying before twenty-one or marriage without leaving any child or children; if leaving any, upon truſt for the child or children, in the ſame manner; and if *Barrington Price* ſhould die in the teſtator's life, leaving only one child living at his deceaſe, or born in due time afterwards, or if more, all but one ſhould die before becoming entitled to any ſhare, and without leaving iſſue, upon truſt for ſuch one; and if *Barrington Price* ſhould die in the teſtator's life without leaving any child or children living at his deceaſe or born in due time afterwards, or if any, they, their child, children or iſſue, ſhould die before becoming entitled to the ſaid ſtock as a veſted intereſt, then the ſame to fall into the reſidue, and go to his nephew *George Barrington*, reſiduary legatee and executor.

After ſeveral other legacies the teſtator gave to the plaintiffs the ſum of 5,000 *l.* part of his ſtock of and in the 3 *per cent.* Bank Annuities; upon truſt for and for the benefit of all and every the child and children of his niece Mrs. *Triſtram*, the wife of the Reverend *Thomas Triſtram*, if more than one, in and by equal parts or ſhares; and to be veſted intereſts in, and transferred to, July 22.

A bequeſt for all and every the children of A. includes every child born before the period of diſtribution; which in this caſe was the attainment of the age of twenty-one by the eldeſt, the marriage of a daughter, or the death of a child under twenty-one, leaving iſſue. Upon the general rule a child by a ſubſequent marriage was included, notwithſtanding a ſtrong implication in favour of children by the prior marriage.

ſuch of them as ſhould be a ſon or ſons, as or when he or they ſhould attain his or their age or ages of twenty-one years reſpectively, and in and to ſuch of them as ſhould be a daughter or daughters at the like age or ages, or upon her or their marriage or marriages before ſuch age with conſent of the plaintiff, or the ſurvivor, his executors, *&c.*; and he directed, that the dividends thereof, or ſuch part or parts thereof, and ſo much as the plaintiff ſhould think fit, ſhould be in the mean time applied for the maintenance and education of the children of his ſaid niece Mrs. *Triſtram* during their reſpective minorities, without any regard to the ability of their father, or his ſituation or circumſtances in life: but if any of the children of the ſaid Mrs. *Triſtram*, being a ſon or ſons, ſhould die before the age of twenty-one, or, being a daughter or daughters, before that age, not having been married with ſuch conſent, and without leaving any iſſue then living, then the expectant parts or ſhares of ſuch children ſo dying before being veſted of and in the ſaid 5,000 *l.* 3 *per cent.* Annuities ſhould go or accrue to, and be upon truſt for the benefit of, the ſurviving children of his ſaid niece Mrs. *Triſtram*, if more than one, in equal ſhares; and ſhould be veſted intereſts in, and transferred to, each of them reſpectively at the like ages or times as the original ſhares; and the dividends of ſuch ſurviving ſhares ſhould be in the mean time applied for the maintenance and education of ſuch ſurviving children during minority: but if any of the children of his ſaid niece Mrs. *Triſtram*, ſon or daughter, ſons or daughters, ſhould die before twenty-one, leaving any child or children, the ſhare of every ſuch child ſo dying under age, and leaving iſſue, ſhould be upon truſt for the benefit of his, her, or their, child or children, if more than one, in equal ſhares; and ſhould be veſted intereſts in, and transferred to, each of them reſpectively at the like ages or times, or upon the marriage of ſuch of them as ſhould be a daughter or daughters, with like conſent as before directed reſpecting the ſhares of the child or children of his ſaid niece Mrs. *Triſtram*, and with the ſame ſurvivorſhip as before, in caſe of ſuch child dying under twenty-one and without iſſue, as aforeſaid; and that the dividends, *&c.* of the laſt mentioned ſhares ſhould be applied for the maintenance and education of ſuch laſt mentioned child, *&c.* during minority; and if all the children of his ſaid niece Mrs. *Triſtram*, except one, ſhould die, before he, ſhe, or they, ſhould become entitled to any part of the ſaid 5,000 *l.* Annuities by virtue of that his will, and without leaving any iſſue, as aforeſaid, then and in that event he gave the whole upon truſt for ſuch only ſurviving child; and directed, that it ſhould be transferred to ſuch child, if a ſon at twenty-one, if a daughter, at that age, or marriage with ſuch conſent, as before: but if all and every the child and children of his ſaid niece Mrs. *Triſtram* ſhould die, before they or any of them ſhould become entitled to the ſaid 5,000 *l.* 3 *per cent.* Bank Annuities as a veſted intereſt, and without leaving any child or children, which ſhould live to become entitled thereto, as a veſted intereſt, then and in that event he gave the ſaid 5,000 *l.* Bank Annuities upon truſt for all the children of the ſaid *Barrington Price*, which ſhall be living at the deceaſe of the ſurviving child of his ſaid niece Mrs. *Triſtram*, in the ſame manner as directed concerning the ſaid 10,000 *l.* Bank Annuities; and if none of the children of *Barrington Price* or their iſſue ſhould live to become entitled, the ſaid 5,000 *l.* ſtock to fall into the reſidue.

The teſtator died ſoon after the execution of his will. *Thomas Triſtram* died, according to one witneſs, in 1796; leaving ſix children by his wife. She married again; and by that marriage had one child, *Louiſa Jane Cooke*. That child claiming a ſhare, and the *Triſtrams* claiming the whole, as the only children living at the death of the teſtator, the bill was filed by the truſtees to have the different rights aſcertained.

Mr. Alexander for the family of Triſtram—It was originally held in theſe caſes, that a general bequeſt of this ſort applied only to the deſcription of perſons at the death of the teſtator at fartheſt: but ſome late caſes have let in perſons anſwering the deſcription before the diſtribution. That conſtruction, which would let in the child by the ſecond marriage, would make a conſiderable part of this diſpoſition impoſſible. The queſtion is, whom the teſtator meant by the child or children of his niece *Triſtram*. If the conſtruction is extended to a child coming *in eſſe* after the death of the teſtator, you muſt extend it under this will, ſo as to give to the children of that child a proportion of the fund at the age of twenty-one; which is extending the veſting beyond the period allowed by law: a difficulty, that cannot occur, if it is underſtood children born at the death of the teſtator. The

Court will incline to that meaning, that will meet all the events, that can happen.

Mr. Sutton and Mr. Owen for the defendant Cooke—This is merely a queſtion of intention. The rule, that all children are let in, until there muſt be a diſtributive ſhare given to one, muſt govern this caſe: *Andrews* v. *Partington* (a), *Hoſte* v. *Pratt* (b), *Middleton* v. *Meſſenger* (c). Suppoſe, all the children by the firſt huſband died, before the money was diſtributable: is the bounty, evidently intended as a proviſion for the children of his niece, to lapſe? The Court will not incline to ſuch a conſtruction. The difficulty ſuggeſted muſt be conſidered, when the caſe ariſes: but one eventually bad limitation in a will does not of neceſſity govern the conſtruction. *Triſtram*, the father, appears to have been dead, when the will was made.

Lord CHANCELLOR—The rule of the Court now being to let in all children, until there muſt be a diſtributive ſhare given to one, the conſtruction upon the whole of this will ſeems to be, that every child muſt be let in, until ſome child attains twenty-one, or dies, leaving iſſue. The firſt attaining twenty-one muſt be paid his ſhare, and then it muſt be apportioned; unleſs ſome other prior event would compel you to fix the ſhares. The rule of the Court has gone upon an anxiety to provide for as many children as poſſible with convenience. Therefore any coming *in eſſe*, before a determinate ſhare becomes diſtributable to any one, is included. My private opinion is, he never thought of his niece marrying again; but the object was the children of Mr. *Triſtram*. The words "the wife of the Reverend *Thomas Triſtram*" are merely words of deſcription. In the direction for maintenance, without regard to the ability of their father, I ſhould ſuppoſe, he thought, Mr. *Triſtram* was alive, and that he meant him: but the words are not ſo; and if the rule is to include all children coming *in eſſe*, before there muſt be a diſtributive ſhare given to one, the words "their father" in that paſſage are not ſufficient to ſupport my private opinion againſt the rule. In the gift over he excludes children of *Barrington Price*, that ſhould not be living at the death of the ſurviving child of Mrs. *Triſtram.* There too, I think, he meant children by Mr. *Triſtram:* but it would be very difficult to make out the title of the children of *Barrington Price* againſt her children by any other huſband. The difficulty put by Mr. *Alexander* confirms my private opinion: but the rule requiring, that all the children ſhall take, who come *in eſſe*, before there is a neceſſity for determining the ſhare of any child, it only comes to this; that the teſtator has given to perſons, whom the law makes certain, property, with a limitation over, which cannot take effect; which happens every day. Notwithſtanding a ſtrong conjecture againſt my judicial opinion, I am bound to declare, that every child of Mrs. *Triſtram* ſhall take, who will come into exiſtence before any ſon of Mrs. *Triſtram* attains the age of twenty-one, or any daughter attains that age, or marries, or any child marries, and dies, leaving iſſue; for a child may marry, and die under twenty-one, leaving iſſue. Decree, that the ſtock ſhall be transferred to the Accountant-General, and the coſts of all parties paid out of the reſidue. Wherever a teſtator by his will raiſes a doubt upon the meaning of it, his general property pays for ſettling that doubt. This being a ſpecific legacy of ſtock, the dividends are due for maintenance from the death of the teſtator.

(a) 3 *Bro. C. C.* 401. (b) *Ante*, vol. 3. 730.

(c) *Ante*, vol. 5. 136. *Preſcott* v. *Long*, *ante*, vol. 2. 690. *Godfrey* v. *Dawes*, *ante*, 43.

PAINE *v.* MELLER.

July 22.

Upon the 1ſt of *September* 1796 the plaintiffs ſold to the defendant by auction ſome houſes in *Ratcliffe Highway*, upon the uſual terms, a depoſit of 25*l. per cent.*, and a proper conveyance to be executed upon payment of the remainder of the purchaſe money at *Michaelmas* next. The premiſes were with others ſubject to certain annuities: but a truſt of ſtock was declared for the payment of theſe annuities. The firſt abſtract delivered was clearly defective: ſo that the purchaſe could not be completed at the

Contract for the ſale of houſes; which from defects in the title could not be completed on the day. The treaty however proceeded, upon a propoſal to waive the objections upon certain terms. The houſes being burnt before a conveyance, the purchaſer is bound, if he accepted the title; and the circumſtance, that the vendor ſuffered the inſurance to expire at the day, on which the contract was originally to have been completed, without notice, makes no difference. A reference to the Maſter was therefore directed to inquire, whether the propoſal was accepted, or acquieſced in, on behalf of the purchaſer.

the time. A farther abſtract was delivered to the Solicitor for the defendant at the end of *September* or the beginning of *October*. He inſiſted upon having a releaſe from the annuitants. The treaty continued through *October*; and about the end of that month the defendant's Solicitor agreed to waive all objections, if the plaintiff would allow him eleven guineas, and if the truſtees of the ſtock would join in the conveyance; and refuſed a propoſal to give up the purchaſe. The plaintiff agreed to make the allowance deſired. On the 4th or 5th of *November* the defendant's Solicitor ſent a draft of a conveyance. The truſtees of the ſtock were prevailed upon to join in the conveyance by a new declaration of truſt. The draft was returned to the defendant's Solicitor: the deeds were engroſſed; and upon the 16th or 17th of *December* he declared himſelf ſatisfied with the title; and ſaid, the deeds would be ready in two or three days; and that he ſhould complete the purchaſe under the promiſe of the eleven guineas. Upon the 18th of *December* the houſes were burnt: the inſurance having been ſuffered to expire at *Michaelmas* 1796. On the 20th of *December* the defendant's Solicitor wrote a letter; obſerving, that he had taken an objection to the freehold title; and ſhould not have thought any thing more of the purchaſe but for the covenant of indemnity from the truſtees, inſerted in the draft by him, and approved by one of the truſtees of the ſtock: but as that had been ſtruck out by another truſtee, he could not adviſe his client to accept the title; and he ſhould call for the depoſit.

The bill was then filed; praying a ſpecific performance of the contract; and a decree was made by the late Lord Chancellor, ſimply referring it to the Maſter, to ſee, whether a good title could be made. This decree was diſſatisfactory to both parties, as not deciding the queſtion; and a petition of rehearing was preſented by the plaintiff.

Mr. Mansfield and Mr. Cox for the plaintiff inſiſted, that the objection to the title from the charge of the annuities was frivolous: there being a fund of ſtock with a truſt declared upon it.

Mr. Sutton and Mr. Lewis for the defendant—The delay in performing this contract aroſe from the defect of the title; and the plaintiff ought to have acquainted the defendant with the circumſtance of the inſurance expiring. In *Stent* v. *Baylis* (*a*), referred to in *Mortimer* v. *Capper* (*b*), Sir *Joſeph Jekyll* expreſſes a clear opinion upon this caſe (*c*.) *Pope* v. *Roots* (*d*).

Mr. Mansfield in reply—All the caſes referred to are got rid of by *Jackſon* v. *Lever* (*e*). The former caſes proceeded upon this fallacy, that the party could not have the thing bought; for, chance had decided againſt him: but he had the chance; and he muſt take it each way. In the caſe of a life it might laſt fifty years, and might drop the next day. But this is not a purchaſe of property depending upon the contingency of life, like an annuity. A man purchaſing a houſe is to conſider with himſelf, whether he will inſure, or not. Not a word was ſaid about inſurance: therefore notice was not incumbent on the plaintiffs; and there was as much negligence in the defendant in not inquiring about that. Such an accident did not occur to either of them. If in the ſale of a houſe nothing is ſaid about inſurance, it could not enter into the bargain.

Lord CHANCELLOR—The abſtract firſt delivered was undoubtedly imperfect in certain reſpects. It did not go back farther than forty-three years; and there was no ſpecific mention of the property in *Ratcliffe Highway* in the abſtract. There was alſo the objection upon the annuities. Unqueſtionably that abſtract was not ſatisfactory; and the expreſs condition of the ſale could not be complied with (*f*). Of courſe the defendant could not be called on to pay his purchaſe money. Then it was with the vendee to chooſe to go on with the bargain or to put an end to the contract. The agent however choſe not to put an end to it; and though a circumſtance took place at *Michaelmas* ſufficient to put an end to any action of law, the contract was kept alive, at leaſt to the 10th of *December*. It is clear, the objection was given up as to the freehold title; and the only difference was as to the indemnity againſt the annuities, affecting theſe with other premiſes. I do not conſider, whether this objection is of form or ſubſtance: but leave it to be determined, when it may be neceſſary, whether the purchaſer under ſuch circumſtances has not a right to inſiſt, that

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(*a*) 2 *P. Will.* 217. (*b*) 3 *Bro. C. C.* 156. (*c*) 2 *P. Will.* 220.
(*d*) 7 *Bro. C. C.* 184. (*e*) 3 *Bro. C. C.* 605.
(*f*) *Harrington* v. *Wheeler*, *ante*, vol. 4. 686. *Seton* v. *Slade*. *Poſt*.

the annuitants ſhall releaſe the premiſes; or, whether this Court will ſay, under all circumſtances the purchaſers ſhall take the premiſes burthened with the annuities with a great number of others; and ſeek their indemnity againſt the truſt property and the truſtees; if they preferred a perſonal covenant by the truſtees. If in equity theſe premiſes belonged to the vendee, he would have a title to the rents and profits at *Michaelmas* by relation; and he muſt pay the purchaſe money with intereſt from that time. Firſt, it is ſaid, the title was never accepted in fact: 2dly, if not, under theſe circumſtances a Court of Equity will not compel a ſpecific performance. As to the ſecond point the objection is grounded upon two circumſtances: 1ſt, the ſimple fact of the fire; 2dly, that the premiſes had been inſured prior to the contract; that that fact and the fact, that the inſurance expired at *Michaelmas* 1796, were not diſcloſed; and that the premiſes afterwards remained uncovered by any inſurance. The authority of Sir *Joſeph Jekyll* has been mentioned: but no caſe has been cited in ſupport of that dictum; and it is in a degree ſuggeſted, not admitted at the Bar, that it may be conſidered overruled by ſubſequent caſes. As to the mere effect of the accident itſelf no ſolid objection can be founded upon that ſimply; for if the party by the contract has become in equity the owner of the premiſes, they are his to all intents and purpoſes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be deviſed as his; they may be aſſets; and they would deſcend to his heir. If a man had ſigned a contract for a houſe upon that land, which is now appropriated to the *London* Docks, and that houſe was burnt, it would be impoſſible to ſay to the purchaſer, willing to take the land without the houſe, becauſe much more valuable on account of this project, that he ſhould not have it. As to the annuity caſes and all the others, the true anſwer has been given; that the party has the thing he bought; though no payment may have been made; for he bought ſubject to contingency. If it is a real eſtate, he of courſe has it. Then as to the non-communication, I cannot ſay, that in my judgment forms an objection; for I do not ſee, how I can allow it, unleſs I ſay, this Court warrants to every buyer of a houſe, that the houſe is inſured, and not only inſured, but to the full extent of the value. The houſe is bought, not the benefit of any exiſting policy. However general the practice of inſuring from fire is, it is not univerſal; and it is yet leſs general that houſes are inſured to their full value, or near it. The queſtion, whether inſured or not, is with the vendor ſolely, not with the vendee; unleſs he propoſes ſomething upon that; and makes it matter of contract with the vendor, that the vendee ſhall buy according to that fact, that the houſe is inſured. I am therefore of opinion, that if the agent on behalf of this purchaſer did accept this title previouſly to the deſtruction of the premiſes, the vendors are in the ſituation, in which they would have been, if the title and the conveyance were ready at *Michaelmas* 1796, but by the default of the vendee were not executed, but the title was accepted, and the premiſes were burnt down on the quarter day. As to the fact, where there has been a great deal of treaty, and a conſiderable hardſhip muſt fall upon one party, if the caſe is to be put entirely upon the fact, the Court muſt guard againſt ſurpriſe; and I am not ſure, even the plaintiff's witneſſes accurately underſtand the nature of the facts they depoſe to. It is to be obſerved, they are all the plaintiff's agents, ſubject to the influence neceſſarily belonging to that ſituation. The caſe is therefore not ſufficiently clear upon the fact; and there ought to be ſome reference to the Maſter or an inquiry before a jury: but that muſt not be upon the validity of the title; for it is clear, the objection to the freehold title, that it was not old enough, and the other objection, that the purchaſer had a right to inſiſt upon a releaſe of the annuities, were waived. The queſtion between them is, whether the parties agreed, that an indemnity ſhould be given in any form; and if ſo, in what form. The inquiry muſt be, whether the title had been accepted by the agent on behalf of the defendant on or before the 18th of *December* 1796. That inquiry will miſcarry, unleſs the Maſter or the Jury, if ſatisfied, that there was an acquieſcence in the propoſal, ſhall be of opinion, that is an acceptance of the propoſal. I ſhould think, a Court of Law would hold that: but if there is any doubt of it, I would rather refer it to the Maſter to inquire, whether the agent on behalf of the defendant had accepted or acquieſced in the propoſal; with a direction, that he ſhould be examined; and they will appreciate the credit due to him; and will not forget, that he was bartering for himſelf for eleven guineas; if that appears.

The decree was reverſed; and the reference to the Maſter directed accordingly.

1801.

July 24, 25.

GOUGH *v.* THE WORCESTER AND BIRMINGHAM CANAL COMPANY.

Conſtruction of a covenant in a leaſe, that if the leſſor ſhall be minded to ſet out any part of the premiſes for a ſtreet or ſtreets, or to ſet or ſell any part to build upon, he may reſume upon certain terms. If he reſumed, having a *bonâ fide* intention to build, though that cannot be acted upon, there is no Equity for the tenant. 2dly, The generality of the latter words are not reſtrained by the former to buildings of any particular ſpecies: therefore a contract with a Canal Company for the lands reſumed was enforced: warehouſes being within the meaning of the leaſe; and wharfs, at leaſt as appurtenant, and wanted for the enjoyment of the warehouſes. A compenſation was decreed for the land covered with water; and as to towing paths, and the banks of baſons, though ſtrictly ſubjects of compenſation, yet upon a rehearing and after great litigation the Court would not reverſe the decree, and direct another reference to the Maſter, merely on that account.

HARRY GOUGH by indentures of leaſe, dated the 26th of *May* 1749, demiſed ſome lands in the neighbourhood of *Birmingham* to *Joſeph Richards* for a term of ninety-nine years at the annual rent of 47 *l.* and the farther yearly rent of 8 *l.* for every acre of meadow or paſture, which had not been in tillage for ten years laſt, that *Richards* ſhould at any time during the term plough up. The leſſee covenanted within three years to lay out 350 *l.* at leaſt in new building two meſſuages, and in erecting dwelling houſes upon part of the premiſes then marked or ſtaked out for that purpoſe, 30 yards by 120. He alſo covenanted to occupy in a huſband-like manner, and not to demiſe or grant over the leaſe to any perſon except his wife, children, or grandchildren, for any term exceeding a year without licence; with the uſual proviſo of re-entry.

The leaſe alſo contained this covenant; that if the ſaid *Harry Gough*, his heirs or aſſigns, ſhall be minded to ſet out any part of the ground hereby demiſed (except the piece of land above mentioned to be marked or ſtaked out for the ſaid leſſee, his executors, adminiſtrators, and aſſigns, to be built upon) for a ſtreet or ſtreets, or to ſet or ſell any part or parts thereof to build upon, and ſhall at any time during the ſaid term give to the ſaid leſſee, his executors or aſſigns, two months notice in writing of ſuch intention, then it ſhall be lawful for the leſſor and his heirs to enter upon ſuch ground, to be ſet out for a ſtreet or ſtreets, or to be ſet or ſold, as aforeſaid, to build upon, and to diſpoſe thereof for the purpoſes aforeſaid, as he or they ſhall think fit; and that from and after ſuch entry or entries the ſaid leſſor, his heirs or aſſigns, ſhall diſcount and allow, or otherwiſe it ſhall be lawful for the ſaid leſſee, his executors and aſſigns, to retain yearly out of the rents reſerved, as much money for all ſuch ground of the ſaid demiſed premiſes as ſhall be ſet out for a ſtreet or ſtreets, to be ſet or ſold to be built upon, as ſhall be proportionable to the re-

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ſerved rent for the whole; which is to be taken by the ſaid leſſee, his executors or aſſigns, in full ſatisfaction for all ſuch ground as ſhall be ſet out for a ſtreet or ſtreets, or ſet or ſold for the purpoſes aforeſaid; and that no greater or other ſatisfaction or detainer ſhall be made by or to the ſaid leſſee, his executors or aſſigns, on account thereof: but it is further agreed, that all ſuch ground as ſhall be ſet out for a ſtreet or ſtreets, or to be ſet or ſold to build upon, purſuant to the ſaid agreement, ſhall, as ſoon after the ſame ſhall be ſet out for the purpoſes aforeſaid as may be, well and ſufficiently be hedged and fenced from the ground thereby leaſed adjoining thereto at the expence of the leſſor, his heirs, and aſſigns.

The leſſor died ſeveral years ago; having deviſed all the premiſes compriſed in the leaſe to his wife and her heirs. She died; leaving an only ſon, her heir at law and deviſee. The town of *Birmingham* increaſing rapidly, the widow and her ſon gave ſeveral notices of reſumption under the covenant; and the tenants delivered up the land accordingly. The leaſe by meſne aſſignments became veſted in *John Gueſt*. Moſt part of the premiſes reſumed was let upon building leaſes: but ſome pieces, one particularly, conſiſting of 3 roods and 20 perch, remained in the poſſeſſion of the ſon.

In the 31ſt year of King *George* 3d, 1790, an act of Parliament paſſed, incorporating the *Worceſter* and *Birmingham* Canal Company. Upon the 9th of *July* 1792 *Gueſt* was in poſſeſſion of 13 or 14 acres; and *Gough* was in poſſeſſion of the ſaid piece of 3 roods and 20 perch. An agreement took place between *Gough* and the Canal Company; by which he was to demiſe to them all his lands in the occupation of *Gueſt* or his under-tenants, and two meſſuages and two ſmall tenements thereon, with the appurtenances; they paying for all ſuch part as he has a right to take from *Gueſt*, purſuant to the proviſion in his leaſe, at the rate of 25 *l. per* acre *per annum*, from the time they take poſſeſſion; and paying to *Gough* for ſuch part as he has not a right to take from *Gueſt*, purſuant to ſuch proviſo, the rent *Gueſt* pays during his leaſe, and afterwards at the rate of 25 *l. per* acre; the Company to hold the ſaid land in perpetuity under the rents above ſpecified; without paying any conſideration for the buildings erected thereon on. Upon the 18th of *September* 1792, notice was ſerved upon *Gueſt* under the clauſe of reſumption to quit the land, except the piece ſtaked out to be built upon at the granting of the leaſe. Poſſeſſion was delivered accordingly by *Gueſt*; and the Company took poſſeſſion of that land, and alſo of the 3 roods and 20 perch, of which *Gough* was in poſſeſſion; and dug brick earth; and exerciſed other acts of ownerſhip.

Gueſt afterwards ſet up claims; and in *July* 1793 called a meeting of the Commiſſioners under the act; who made their award on the 9th of *Auguſt*; by which reciting, that it appeared to them, that the Company had cauſed all the land in the occupation of *Gueſt* or his under-tenants and the appurtenances to be marked out, as wanted by them for the purpoſes of the navigation; and farther, reciting the agreement between *Gough* and the Company, they determined, that the Company ſhould pay the ſaid rent of 25 *l. per annum* an acre for all and every the ſaid lands as ſhould be ſo taken and uſed by them, and ſo proportionably for a greater or leſs quantity than an acre, to *Gueſt*, his executors, *&c.* for ſuch part of the lands as at the time of making the agreement was in his occupation, for the reſt of the term of ninety-nine years, and to *Brother* and *Lynden*, his under-tenants for their terms, and from the expiration thereof to *Gueſt* during the remainder of the term. The Act gave no appeal.

The Company refuſing to pay *Gough*, a notice was ſerved by him on the 21ſt of *May* 1795, requiring them to attorn to him under the agreement; and no anſwer being returned, he brought an ejectment in the Court of *King's Bench*; which was tried at the Summer Aſſizes for the County of *Warwick* in 1795; when the Jury found, that ſix acres, part of the land, were taken for the uſe and purpoſe of the navigation; and the remainder for the purpoſe of building ſtreets; and that ſuch ſix acres were ſufficient for the building of wharfs and warehouſes. That was upon evidence to that fact taken by agreement. A verdict was then taken for the plaintiff, ſubject to the opinion of the Court upon a caſe reſerved; ſtating all the facts, and, among them, that the Company had dug and uſed a quantity of brick earth, and exerciſed other acts of ownerſhip; and alſo ſtating the above finding of the Jury upon parol evidence. Upon the 2d of *June*

1796

1796 judgment was given for the plaintiff for all the premiſes, except the ſix acres.

Gough offered the Company a leaſe at a rent of 25 *l.* an acre *per annum*, and upon being paid the arrears; and in the ſame letter his agent obſerved, that though by this deciſion he was not entitled to the whole of the ſix acres, yet he was by no means precluded from obtaining a compenſation for his right of building upon this land, and other rights attached to him as landlord; and propoſing a reference to individuals or a Jury under the Act, to determine, what the compenſation ſhould be. Upon the 3d of *June* 1796 a bill was filed by the Canal Company againſt *Gough*; praying a ſpecific performance of the agreement, and an Injunction to reſtrain him from proceeding at law to obtain judgment or execution. *Gough* by his anſwer ſtated, that the conveyance they tendered reſerved only the rent reſerved in the leaſe; and alſo compriſed the 3 roods and 20 perch. Upon the 12th of *July* 1796 the Company offered by a letter from the Solicitor for them and *Gueſt* to take the whole of *Gough*'s land at 25 *l.* an acre *per annum*, as formerly agreed upon. A correſpondence followed between the agents; and a letter, dated the 11th of *January* 1797, ſtated, that the Company had at length determined upon the quantity of land to be taken for the canal; which was 9 acres and 38 perch; that that was all the land they conceived they ſhould have occaſion for; and that what remained was all compact, and the moſt eligible part for building on.

The bill, upon which this cauſe was inſtituted, was filed by *Gough* upon the 27th of *May* 1797; praying, that his rights and intereſts in the premiſes may be aſcertained; that he may be quieted in the enjoyment; that the agreement may be ſpecifically performed, ſo far as it can be performed; that the Company may accept a leaſe accordingly, except the ſix acres; that the compenſation to be paid by them to the plaintiff for the ſix acres may be aſcertained; that an account may be taken of the rents of the premiſes, except the ſix acres, ſince the Company had poſſeſſion; and an account of what is due to the plaintiff in reſpect of the ſix acres during the poſſeſſion of the Company, and of the compenſation, which ought to be paid to him, and for payment upon ſuch accounts; and that the plaintiff's rights under the clauſe in the leaſe and the ſeveral contracts and agreements may be ſettled; and that an Injunction may be granted to reſtrain *Gueſt* and his under-tenants from proceeding in ejectment againſt the plaintiff and the Company, and from all proceedings at law againſt the plaintiff.

The bill charged, that the price was agreed upon on account of the ſituation of the premiſes, and their value to be let or ſold for building, and the probability, that an opportunity would ſoon offer to the plaintiff of letting or ſelling the premiſes for that purpoſe. The Company never agreed to pay ſo high a price for land for the purpoſes of the Canal; which could not be let or ſold for building; and if the land could have been uſed only for the purpoſes of huſbandry, for which alone *Gueſt* could uſe it, they never would have given near ſo high a price.

The Canal Company by their anſwer ſtated, that it was underſtood upon the treaty, that the plaintiff had a right under the covenant in the leaſe to take from *Gueſt* for the purpoſe of building upon all the land, except as in the bill mentioned, but not to ſell or demiſe to them for the purpoſe of the navigation; and therefore they applied to *Gueſt* to deliver them poſſeſſion; which he promiſed, if they could agree with the plaintiff for the purchaſe of his intereſt; and in confidence of ſuch promiſe the agreement with the plaintiff took place. The price was in conſideration of the ſituation of the premiſes, as convenient and neceſſary for the uſe of the navigation, and of the value the premiſes were worth to be let or ſold for building. They admitted, that they have not paid, or offered, near ſo high for any other land, purchaſed for the purpoſe of the canal; which is not in a ſituation, where it might be let for the purpoſe of building upon; and if the land could have been uſed only for huſbandry, they would not have given the ſame price. They never entered upon the 3 roods and 20 perch. They made 1,500,000 bricks. Under the award of the Commiſſioners *Gueſt* demiſed the land to them: *viz.* 13 acres 12 perch (including 1 rood 39½ perch of the land ſtaked out for building at the date of the leaſe) at 25*l.* an acre for all, except the one rood 39½ perch. They were adviſed, the award of the Commiſſioners controlled the agreement. They want no more than 9 acres and 38 perch for the purpoſe of the canal;

and are not warranted by the Act to take more; and are prohibited by the Statute of Mortmain* from taking more. They inſiſted, that their agreement with the plaintiff was annulled, not only by the award, but by the judgment in the Ejectment; and *Gueſt*'s demiſe to them of the 13 acres, 12 perch, was alſo become of no effect. They ſtated, that they are willing to pay a rent of 25*l.* an acre *per annum* for the 9 acres 38 perch to whomſoever is entitled: but it was claimed both by the plaintiff and *Gueſt*. They admitted, that at the time they took poſſeſſion it was underſtood, that the plaintiff had a right to reſume all the land, except what was mentioned in the bill to be marked and ſtaked out for the leſſees to build upon.

Gueſt by his anſwer inſiſted, that part of the land reſumed having remained in the plaintiff's hands, and not being let or ſold to build upon, was contrary to the clauſe in the leaſe. He ſtated, that evidence was given before the Commiſſioners, and it was underſtood then, that the Company would want the whole of the land for the purpoſes of the navigation; and they have declared ſo. He alſo ſtated, that the land was not of any conſiderable value on account of the proſpect of being built upon. In that reſpect he was contradicted by the Company and the under-tenants.

Of the defendants the Canal Company only entered into evidence. Several witneſſes ſtated, that 9 acres 38 perch were wanted for the purpoſe of the navigation: *i. e.* for making a baſon, erecting ſluices, wharfs, and places for landing goods, cranes, weight-booms, and other engines, to be uſed for the canal. One witneſs ſtated, that what he thought neceſſary to be applied to the purpoſes of the navigation was not ſufficient with regard to the traffic expected: the Company having taken other lands of Sir *Thomas Gooch*. Another witneſs ſtated, that part of the land was neceſſary for the purpoſe of the navigation; the whole was not. Three acres one rood are at preſent unneceſſary for the navigation.

By the decree, pronounced upon the 9th of *December* 1799, it was declared, that the plaintff at the date of the agreement was entitled to the whole of the land in queſtion for the purpoſe of building, except the land in the original leaſe mentioned to have

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been ſtaked and marked out for building; and a reference to the Maſter was directed, to aſcertain the quantity, *&c.*; and to diſtinguiſh the excepted land, and to aſcertain the quantity of ſuch part of the reſt as was covered with water for the uſe of the canal navigation; and how much of the land covered with water was, when the Company took poſſeſſion, in the occupation of *Gueſt* and the under-tenants; and it was declared, that the Company ſhould accept a demiſe in perpetuity of all the lands, ſubject to the intereſt of *Gueſt* in the piece of land in the original leaſe mentioned to have been ſtaked and marked out; reſerving a rent of 25*l.* an acre *per annum* for the whole, except the laſt mentioned piece, and for that a proportion of the rent reſerved by the original leaſe during the remainder of the term thereby granted; and after the expiration of that term 25*l.* an acre, to the plaintiff, his heirs, and aſſigns, from the time the Company took poſſeſſion. An account of the rents was directed; and an inquiry, what compenſation by a ſum in groſs or an annual rent ought to be made to *Gueſt* and the under-tenants for their reſpective intereſts in ſuch parts as were covered with water: if a ſum in groſs, to be paid by the plaintiff, if an annual rent, by the Company, to *Gueſt* and the under-tenants. An account was directed of the rents paid already by the Company to *Gueſt* and the under-tenants in reſpect of the lands, except thoſe marked out for building in the original leaſe; and in caſe the compenſation to *Gueſt* and the under-tenants ſhall be by a ſum in groſs, it was directed, that they repay to the Company what ſhall appear upon ſuch account to have been received by them: but if by a rent, that they deduct and retain the amount of ſuch rent as ſhall at the time of taking ſaid account be due to them reſpectively, out of the monies received by them reſpectively; and pay the overplus, if any, to the Company. The Maſter was directed to ſettle the proportion of rent, which by the original leaſe ought to be abated by the plaintiff in reſpect of the lands to be demiſed to the Company, excluſive of the land marked out, as aforeſaid. An Injunction was directed to reſtrain *Gueſt* and the under-tenants from diſturbing the poſſeſſion of the Company under the demiſe. The plaintiff was directed to pay the coſts of the defendants, except the Company and *Gueſt*, and the Company to repay to the plaintiff the coſts he was directed to pay, together with his own coſts.

A Petition of rehearing was preſented by *Gueſt* upon the following grounds: 1ſt, that the Decree is erroneous in giving the plaintiff any preſent right or intereſt in any part of the premiſes; upon which the plaintiff had not at the time he ſerved the notice or at the filing of the bill a *boná fide* intention of building ſtreets or houſes: the building ſtreets or houſes being the only purpoſe, for which the plaintiff was authoriſed by the clauſe of reſumption to call for the land; and the plaintiff has proved, that he had no ſuch intention; having ſtated by his bill the agreement with the Company; and he muſt have known, they could not take lands for the purpoſe of building ſtreets or houſes, or any other purpoſe than thoſe of the canal only; therefore the notice was fraudulent, to deprive the defendant *Gueſt* of the benefit he might derive by means of the canal:

Secondly; that the verdict was proceeded upon as concluſive evidence againſt the defendant *Gueſt*, as to the quantity of land intended to be applied by the Company for the purpoſes of the navigation; notwithſtanding the Company by their anſwer ſtated, that they ſhould want a larger quantity for ſuch purpoſes: therefore the defendant was not concluded by ſuch verdict; but was entitled to an iſſue or ſome other mode of inquiry:

Thirdly; that the decree refers it to the Maſter to ſettle the compenſation, if any ſhould be made to *Gueſt*, for his right and intereſt in ſo much land as was covered with water: whereas the Act directs all compenſation to be aſſeſſed by a Jury:

Laſtly; that the decree has not directed the coſts of the ſuit to be paid to *Gueſt*; as it has directed with regard to the other defendants, the under-tenants.

Mr. Richards and Mr. Horne in ſupport of the Petition of rehearing. *Mr. Manſfield and Mr. Thomſon, for the Canal Company. Mr. Romilly and Mr. Toller for the plaintiff*, in ſupport of the decree.

The Lord CHANCELLOR, ſtating the caſe very particularly, delivered his judgment (*a*):

It muſt be upon the conviction of the Legiſlature, that ſome very conſiderable public benefit will ariſe from ſuch an undertaking, that they give ſuch large powers of breaking in upon private property by theſe acts of Parliament; and it has happened in this, as in moſt other inſtances, that the Commiſſioners were not ſatisfied with the very large powers they had. Their award was at leaſt very abſurd.

The generality of the latter words of this covenant is not to be confined to ſtreets, nor even to building houſes; and the obſervation is well founded; that the former words being ſo confined, the generality of the latter ſhews a different intention. The Company by their anſwer ſay, they want only 9 acres 38 perch for the purpoſe of the canal; and are not warranted to take more: but I am clearly of opinion, that having made the agreement with the plaintiff for the greater quantity they could not retract. With reſpect to the 3 roods 20 perch, that were not actually built upon, my opinion, if that had been brought diſtinctly before the Court, would have been, that if the Jury could have been ſatisfied, that the landlord had an intention *bonâ fide* at the time of building upon them, and afterwards found, he could not, there was no ground for this Court to ſay, that, becauſe that intention was not finally acted upon, therefore the tenant had an Equity. There is great difficulty as to frauds upon covenants; and it is much ſafer to go by the literal conſtruction. Upon that the plaintiff had a right to reſume any part for the purpoſe of building upon, and for no other purpoſe. The verdict, that the ſix acres were taken for the uſe and purpoſe of the navigation, is very looſe. If five of thoſe acres were taken for the purpoſe of building warehouſes, that would have been for the purpoſe of the covenant; the terms of which are not reſtrained to buildings of any particular

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(*a*) The Lord Chancellor remarked with diſapprobation the unuſual length of the Petition of rehearing; and inclined to make the petitioner pay the expence occaſioned by ſo unneceſſarily loading the Record, as it appeared, againſt the advice of his Counſel: but afterwards his Lordſhip ſaid, that as this was a very complicated caſe, and allowing for the apprehenſion and anxiety of the party, that in bringing it before the Court nothing material ſhould be omitted, he ſhould ſimply affirm the decree.

lar ſpecies. Upon the evidence all the ſix acres were taken for the purpoſe of building; for their ſituation, cloſe to the town, at the end of the canal, was moſt proper for wharfs, warehouſes, or buildings within the meaning of the leaſe. I will not ſay, I am ſure, wharfs are within the meaning of the leaſe: but upon the act of Parliament the Legiſlature ſeems to have conſidered them ſo. They are perhaps rather to be conſidered as appurtenant to the buildings; and ſo, if wanted for the enjoyment of a warehouſe, it is within the leaſe. As to towing paths, and the banks of baſons, the decree would have been better, if thoſe had been allowed for. But I will not, after all this litigation, and with the conſequence of going before the Maſter for a great length of time upon that point, to determine, what that allowance ſhould be, reverſe the decree on that account, merely becauſe I ſhould perhaps have made it a little more full in that reſpect.

Decree affirmed.

MOUNTSTUART *v.* MOUNTSTUART.

July 27.

The Court never makes an order for taking an infant out of its juriſdiction.

LORD *Bute* and Lord *Dumfries* were appointed joint guardians of Lord *Windſor*, an infant of the age of eight years, and his brother of the age of ſeven: Lord and Lady *Bute* being their paternal grandfather and grandmother, and Lord and Lady *Dumfries* their maternal grandfather and grandmother.

The infants were at ſchool at *Sunbury* in *Middleſex*. Diſputes ariſing between the guardians as to their reſidence during the vacation, Lord *Dumfries* preſented a petition; praying, that he may be at liberty to take the infants at proper times to *Dumfries-Houſe* in *Scotland*. This was oppoſed by Lord *Bute* on various grounds.

The Lord CHANCELLOR refuſed to make the order prayed. His Lordſhip would not enter into the particular grounds, on which it was oppoſed; preferring to reſt his refuſal on the general ground, that the Court never made an order for taking an infant out of its juriſdiction.

June 9. 12.
July 14. 27.

CODRINGTON *v.* LORD FOLEY.

LORD FOLEY *v.* CODRINGTON.

Portion raiſed out of a reverſionary term. The rule is, that it depends upon the particular penning of the truſt and a fair conſtruction of the whole inſtrument as to the intention. Upon a limitation to the parent for life with a term to raiſe portions at twenty-one or marriage; if there is nothing more, and the intereſts are veſted, and the contingencies have happened, at which the portions are to be paid, upon the general rule the intereſt is payable, and the portions muſt be raiſed by ſale or mortgage of the term.

LORD *Foley* by his will, dated the 19th of *June* 1777, after in the firſt place directing, that all his worldly eſtate ſhould be ſubject to the payment of his debts, funeral expences, legacies and annuities, gave and deviſed the capital meſſuage, called *Great Witley*, and all other the meſſuages, manors, lands, tenements, and hereditaments, late belonging to *Thomas*, Lord *Foley*, deceaſed, which he (the teſtator) was entitled to under his Lordſhip's will, or otherwiſe, in the counties of *Worceſter*, *Stafford*, *Middleſex*, *Salop*, and *Hereford*, (except the manor of *Malvern*, and certain other premiſes therein after otherwiſe deviſed), whether freehold, leaſehold, or copyhold, ſubject nevertheleſs to the charge therein-after mentioned for making up the deficiency, if any ſhould ariſe in paying his legacies therein mentioned, to and to the uſe of his brother *Robert Foley* and *Abraham Turner*, their executors, *&c.* for the term of ninety-nine years, to commence from the teſtator's deceaſe, without impeachment of waſte; and from and after the end, expiration, or other ſooner determination, of the ſaid term, to the uſe of his eldeſt ſon *Thomas Foley* for life; remainder to truſtees to preſerve contingent remainders; and from and after his deceaſe to the uſe of other truſtees for 100 years, to commence from his deceaſe; in truſt for raiſing a jointure for any wife or wives he ſhould marry, out of any part of the annual rents, iſſues, and profits, of the ſaid manors, *&c.* not exceeding the yearly value of 2,000 *l.*, or an annuity or rent-charge, not exceeding the yearly value of 1,500 *l.* clear of all deductions; and to pay the ſame half yearly on the 25th of *March* and 29th of *September*: the firſt payment to be made on which of thoſe days ſhall firſt happen next after the deceaſe of *Thomas Foley*; and from and after the end, expiration, or other ſooner determination, of the ſaid term of 100 years, and ſubject thereto, to the uſe of other truſtees, their executors, *&c.* for a term of 1000 years, to commence from the day of the deceaſe of his ſaid ſon *Thomas Foley*; in truſt by and out of the rents, iſſues, and profits, of the ſame manors, meſſuages, lands, tenements, and hereditaments, or by ſale or mortgage thereof, or of a competent part thereof, or by any other ways and means, to levy and raiſe any ſum or ſums of money not exceeding in the whole the ſum of 30,000 *l.* for and towards the portion and proviſion of all and every the younger child and children of the ſaid *Thomas Foley*, for ſuch eſtates, in ſuch proportions, under ſuch reſtrictions, and to be paid to him, her, or them, at ſuch time and times, and with ſuch intereſt or maintenance, as the ſaid *Thomas Foley* ſhould by any deed, will, or appointment, by him to be executed in the preſence of two or more witneſſes, limit, declare, or appoint; and for want of ſuch limitation, declaration, or appointment, to be equally divided between them, if more than one, ſhare and ſhare alike; and from and after the end, expiration, or other ſooner determination, of the ſaid term of 1000 years, and ſubject thereto, to the uſe of the firſt and other ſons of the ſaid *Thomas Foley* in tail male; with remainders to the uſe of *Edward Foley*, the teſtator's ſecond ſon, and his firſt and other ſons, and *Andrew Foley*, his third ſon, and his firſt and other ſons, in ſtrict ſettlement; with the like powers to his ſaid ſons of making jointures and charging portions; with ſimilar remainders to the daughters of the teſtator and their ſons ſucceſſively; and then to the daughters of his ſons and daughters reſpectively, as tenants in common; remainder to his brother in tail; remainder to his ſiſter in fee.

The teſtator then declared his will to be, that all the meſſuages or tenements, which he held by leaſe from the truſtees or deviſees of the late Counteſs Dowager of *Oxford* in the county of *Middleſex*, ſhould go and be enjoyed by his ſaid truſtees and ſuch perſon and perſons, upon ſuch conditions, uſes, truſts, intents, and purpoſes, as the ſaid manor of *Witley* and other the eſtates of the ſaid *Thomas* Lord *Foley* deceaſed therein before limited, as far as the nature thereof would admit; and he gave all other the leaſehold eſtates, late of the ſaid *Thomas* Lord *Foley*, which he (the teſtator) was entitled unto by virtue of his Lordſhip's will, to *Robert Foley* and *Abraham Turner*, their executors, *&c.* for and upon the ſame uſes and purpoſes as the manor of *Witley* and other the eſtates of the ſaid *Thomas* Lord *Foley*, as therein before limited, or as near as by the tenure thereof the ſame could be limited; with the power of renewing ſuch of the ſaid leaſes as were renewable.

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The teſtator then deviſed other eſtates, in the county of *Hereford*, to *Robert Foley* and *Abraham Turner*, their executors, &c. for a term of 101 years, to commence from the day of his deceaſe, without impeachment of waſte; and after the end, expiration, or other ſooner determination, of that term, and ſubject thereto, to *Edward Foley* for life; remainder to truſtees to preſerve contingent remainders; remainder to truſtees for 102 years, to commence from his deceaſe, without impeachment of waſte, in truſt for raiſing a jointure of 1,200 *l.* a year out of the annual rents, iſſues, and profits, &c. (as expreſſed in the limitations of the other eſtates to the eldeſt ſon); and from and immediately after the end, &c. of that term, to truſtees for 500 years, to commence from the death of *Edward;* in truſt by the ways and means aforeſaid, or by any other ways and means to levy and raiſe portions, not exceeding 10,000 *l*, for his younger children, for ſuch eſtates, in ſuch proportions, under ſuch reſtrictions, and to be paid at ſuch times, as *Edward Foley* ſhould by deed or will appoint; and for want of appointment, equally; and from and after the end or other determination of that term to his firſt and other ſons in tail male; with ſimilar remainders to *Andrew* and his ſons and *Thomas* and his ſons ſucceſſively; and then to the daughters of the teſtator, &c.

The teſtator deviſed other eſtates to the uſe of his ſon *Andrew* for life; remainder to truſtees to preſerve contingent remainders; remainder to truſtees for 98 years, to commence from his deceaſe, without impeachment of waſte; in truſt for raiſing an additional increaſe of jointure for his preſent or any after taken wife, out of all or any part of the annual rents, iſſues, and profits, &c. (as in the other limitations) not exceeding 400 *l.* a year; and from and immediately after the end or other ſooner determination of that term, and ſubject thereto, to truſtees for 999 years, to commence from the deceaſe of *Andrew Foley;* in truſt by the ways and means aforeſaid, or by any other ways or means to levy and raiſe any ſum, not exceeding 10,000 *l.* for and towards the additional portion of his younger children, for ſuch eſtates, &c. (as in the limitations to *Edward);* with ſimilar remainders to his firſt and other ſons, and *Edward* and *Thomas* and the teſtator's daughters, and their ſons reſpectively, &c.

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The truſts of the terms of 99 years and 101 years were declared to be, that the ſaid *Robert Foley* and *Abraham Turner*, and the ſurvivor, *&c.* ſhould take the rents, iſſues, and profits, of all the manors, *&c.* and cut timber and underwood as they ſhall think proper, not exceeding 3,000 *l.* in one year; and out of thoſe funds and the rents, *&c.* in the firſt place according to their will and pleaſure, and not otherwiſe, allow yearly or oftener to or for the uſe of his ſons *Thomas* and *Edward Foley* any ſum or ſums of money, not exceeding in the whole in any one year 6,000 *l.*, until ſuch of their debts as were then provided for and ſhould be due at his deceaſe ſhould be diſcharged; and in the next place to pay and diſcharge a mortgage, and all ſuch of the debts of his ſaid two eldeſt ſons and the intereſt due thereon reſpectively as in any ſchedule or ſchedules annexed to his ſaid will, or in any other ſchedule or ſchedules by him hereafter to be made and ſubſcribed, ſhould be contained; or as they, his ſaid truſtees, in their judgment and diſcretion ſhould think fit and expedient; but ſo as that neither his ſaid ſons nor their creditors ſhould have any intereſt in or power over the eſtates; and after the deceaſe of his ſaid ſons, and payment of the debts, *&c.* the terms to attend the inheritance.

The will then contained proviſions, that in caſe of the death of his eldeſt ſon without iſſue male, *Edward* and his ſons ſhould take the eſtates deviſed to him; and *Andrew* and his ſons all the other eſtates, except ſome deviſed to be ſold; and that the portions, legacies, *&c.* under the will ſhould be in ſatisfaction for all portions, *&c.* under the marriage ſettlement of the teſtator. Then after ſome directions as to legacies and an annuity, he charged all the eſtates deviſed to him by *Thomas* Lord *Foley*, and not herein deviſed to be ſold, with ſo much as his perſonal eſtate ſhould be deficient to anſwer the legacies herein-before given, or to be given by any codicil; and he deviſed other eſtates in truſt to be ſold; and the money to be applied in payment of his legacies and annuity, as aforeſaid, and afterwards of the ſcheduled debts, as the money under the terms of 99 years and 101 years. He then gave ſeveral legacies, and among them to his grand-daughter *Caroline Georgiana Harriet*, daughter of *Thomas Foley*, 5,000 *l.*

The teſtator by a codicil, taking notice of the death of *Abraham Turner*, appointed his ſon *Andrew Foley* a truſtee in his ſtead.

The teſtator died ſometime afterwards; leaving *Thomas* Lord *Foley* his eldeſt ſon and heir, and tenant for life under the will; who died in 1793; leaving *Thomas* Lord *Foley*, his only ſon, and one daughter *Caroline Georgiana Harriet*, his only younger child; who in 1796 married *Chriſtopher Codrington* Eſquire; and by the ſettlement, previous to that marriage, dated the 8th of *Auguſt* 1796, reciting, that the laſt Lord *Foley* had died without having executed any appointment reſpecting the ſaid ſum of 30,000*l.*, and that Miſs *Foley* was become entitled to the whole of that ſum; and that it had been agreed, that the ſaid ſum ſhould immediately after the intended marriage become the abſolute property of Mr. *Codrington*, and that the ſurviving truſtee of the term of 1000 years ſhould covenant to aſſign the reſidue of the ſaid term to him, as ſoon after the marriage as it could conveniently be done, by way of mortgage for ſecuring the ſaid ſum of 30,000*l.*, with intereſt from the 5th of *July* 1795, to which time all intereſt on the ſaid ſum had been paid, it was witneſſed, and the truſtee covenanted, accordingly.

By other indentures of the ſame date, reciting, that Mr. *Codrington* was deſirous of making the ſaid 30,000*l.* a proviſion for his daughters and younger ſons by the ſaid marriage, he covenanted, that he would, after the ſaid mortgage to be made to him, aſſign the ſame, upon truſt to permit him to receive the intereſt of the ſaid 30,000*l.* for his life; and after his deceaſe to pay the ſaid ſum of 30,000*l.* amongſt all his younger children by the ſaid marriage, in ſuch ſhares and proportions as he and Mrs. *Codrington* ſhould appoint, as therein mentioned; with various proviſions in default of appointment; and in caſe there ſhould be no younger child, who ſhould become entitled to the ſaid ſum of 30,000*l.*, upon truſt for Mr. *Codrington*, his executors, *&c.*; with a power to the truſtees with the conſent of Mr. and Mrs. *Codrington* to call in the 30,000*l.* and inveſt it in the funds in the names of the truſtees.

By indentures, dated the 1ſt of *September* 1796, the ſurviving truſtee of the term of 1000 years aſſigned to Mr. *Codrington*; to hold for the reſidue of the term, ſubject to redemption; if Lord *Foley* or the perſon, who for the time being ſhould be entitled to the premiſes compriſed in the term immediately expectant on the determination thereof, ſhould pay to Mr. *Codrington* the ſum of 30,000*l.* with the intereſt due thereon from the 5th of *July* 1795, on the 1ſt of *March* next; and by indentures, dated the 2d of *September* 1796, Mr. *Codrington* aſſigned and transferred the ſaid ſum of 30,000*l.* and the intereſt to become due from the marriage and all his intereſt in the term of 1000 years; to hold for the reſidue of the term, ſubject to redemption, as aforeſaid; to have and receive the ſaid ſum of 30,000*l.* and the intereſt thereof to become due from the marriage upon the truſts and for the intents and purpoſes expreſſed concerning the ſaid ſum and intereſt in the ſettlement, dated the 8th of *Auguſt* 1796. The truſts of the term of 100 years were ſatisfied.

The bill in the firſt cauſe was filed by Mr. and Mrs. *Codrington*, and their children, four infant daughters, againſt Lord *Foley*, who was under the age of twenty-one, about eighteen, and the truſtees of the term of 1000 years; praying an account of the principal and intereſt due on the ſecurity of the premiſes compriſed in the term of 1000 years; that what ſhall be found due may be paid by the defendant Lord *Foley* to the other defendants upon the truſts of the ſettlement; or that Lord *Foley* and all other perſons entitled to redeem may he foreclosed; and that what ſhall be coming from the ſaid account may be raiſed by ſale of a ſufficient part of the premiſes compriſed in the term of 1000 years; and that the truſtees may be directed to pay the plaintiff *Chriſtopher Codrington* what ſhall appear to be due for arrears of intereſt of the ſaid ſum of 30,000*l.*

The truſtees of the term by their anſwer admitted that the intereſt made payable upon the ſum of 30,000*l.* is at the rate of 4 *per cent.* only; that no payment had been made on that account; and that the plaintiffs had applied to them to raiſe that ſum and the intereſt due, or at leaſt to procure the intereſt to be raiſed to 5 *per cent.*

The defendant *Andrew Foley*, the ſurviving truſtee in the terms of 99 years and 101 years, and alſo one of the truſtees in the marriage

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marriage ſettlement of the plaintiffs, by his anſwer ſtated, that under the truſts of theſe terms the yearly ſum of 6,000*l.* was paid in the proportion of 4,000*l.* to the teſtator's ſon *Thomas Foley* during his life, and 2,000*l.* to his ſon *Edward Foley*; which latter payment ſtill continues; that their debts upon bonds and notes and by ſimple contract at the teſtator's death amounted to 87,800*l.*; great part of which has been ſince paid under the truſts of thoſe terms; all, that remains unpaid, amounting only to about 12,112*l.*; which the defendant believes will be wholly ſatisfied by Midſummer 1802. He farther ſtated, that at the teſtator's death ſeveral other ſums were due from his ſons *Thomas* and *Edward Foley* for principal monies advanced to them in the purchaſe of annuities granted by them to the amount of 120,450*l.*, excluſive of a large ſum due for arrears; and the annuity creditors in 1792 agreed to releaſe all claims for arrears of their reſpective annuities, and to accept their principal money originally advanced by them, on having the ſaid principal ſecured by annual inſtalments of 8,000*l.*, but without intereſt, out of the truſt eſtates compriſed in the terms of 99 years and 101 years. That object was carried into effect by indentures, dated the 1ſt of *March* 1793; under which the ſum of 56,000*l.* has been paid by inſtalments in part diſcharge of the principal ſum; in reſpect of which 64,450*l.* remains a charge on the truſt eſtates.

The anſwer ſuggeſted, that the defendant cannot concur in raiſing the principal ſum of 30,000*l.* or increaſing the intereſt on account of the infancy of the defendant Lord *Foley*, and the truſts of the term of 99 years not being fully performed. The defendant farther inſiſted, that in caſe theſe impediments ſhould not be conſidered ſufficient; yet as the plaintiff Mr. *Codrington* previouſly to the execution of the ſettlement expreſsly promiſed and agreed to wait for the principal and intereſt, until Lord *Foley* ſhould attain the age of twenty-one, and the aſſignment of the term to the plaintiff being made under a perſuaſion, that he would not attempt to make the ſame available to enforce payments prejudicial to Lord *Foley*, until the truſts of the prior term of 99 years were ſatisfied, or, at leaſt, until Lord *Foley* attained the age of twenty-one, the plaintiffs are not entitled to the relief prayed.

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The agreement of Mr. *Codrington* to wait, till Lord *Foley* ſhould attain the age of twenty-one, was alſo ſet up by the anſwer of *Edward Foley;* and according to the anſwers and the evidence of an agent the circumſtances were theſe. The agent being in *July* 1796 ſent to *London* to take inſtructions for the ſettlement informed Mr. *Codrington* of the ſituation of Miſs *Foley*'s fortune; explaining the truſts of the will; and particularly, that ſhe was entitled to 5,000 *l.*, a legacy from her grandfather, and alſo to the ſaid ſum of 30,000 *l.*, as the only younger child of her father, carrying intereſt from his death in 1793, charged on all the eſtates of Lord *Foley* compriſed in the term of 99 years. The deponent then ſtated the truſts of the terms of 99 years and 101 years, the amount of the debts, with which the eſtates were charged, and the progreſs, that had been made in reducing them; and Mr. *Codrington* having heard the ſtatement ſaid, as that was the ſituation of Miſs *Foley*'s fortune, he would wait till Lord *Foley* came of age; but wiſhed to have the 5,000 *l.* as ſoon as it could be got in. The anſwers and evidence repreſented the general underſtanding of all perſons concerned in the ſettlement to have been, that Mr. *Codrington* muſt wait, till the truſts of the terms of 99 years and 101 years were ſatisfied, or till Lord *Foley* ſhould be of age; and ſtated, that the intereſt upon the ſum of 30,000 *l.* was made to commence from the 5th of *July* 1795; as Mr. *Andrew Foley* had advanced money for Miſs *Foley*'s education; and it was agreed, the ſums advanced for that purpoſe, which amounted to two years' intereſt, ſhould be deducted from the intereſt of the 30,000 *l.*

The Croſs Bill prayed, that the truſts of the terms of 99 years and 101 years ſhould be fully ſatisfied, before thoſe of the term of 1000 years ſhould be executed.

An objection was taken on the part of the plaintiffs to the admiſſion of evidence, as being in contradiction to the deed. That objection was overruled, and the evidence read: the Lord Chancellor declaring it admiſſible to the point, that having it diſtinctly before him he underſtood his right; and gave it up.

Mr. Sutton and Mr. Romilly for the plaintiffs—The objections againſt raiſing this portion are, firſt, that as it is to be raiſed out of a revera reverſionary term it cannot be made available, until the truſts of the preceding term are ſatisfied: 2dly, that the plaintiff has waived his right.

Upon the firſt objection, there is no ſuch abſolute rule; and the Court leans againſt that conſtruction, if they can diſcover any circumſtances, affording an inference, that the portion was not to be raiſed, till the term came into poſſeſſion. None of the reaſons uſually aſſigned, for the ſake of the reverſioner, &c. apply to this caſe. This is no more in the diſcretion of the Court than in the option of the truſtees; as Lord *Mansfield* ſays in *Sandys* v. *Sandys* (*a*). How could this power be executed, ſo long as the truſts of the preceding term remained unſatisfied, but by the truſts of the reverſionary term. It is true, the children of Lord *Foley*, the ſon, could not have their portions raiſed in the life of their father. That the children may not be independent of their father, and many other reaſons, operate to that: but after the death of the father the natural time for raiſing the portions arrives. No argument ariſes from the legacy of 5,000 *l.* to Mrs. *Codrington*. Only one child was born at the date of the will; and the teſtator could not know, what number of children there might be. It cannot therefore be contended, that his bounty to her was to be a ſatisfaction, till the other proviſion could be conveniently paid.

The caſes upon this ſubject are very numerous. *Greaves* v. *Mattiſon* (*b*), *Corbett* v. *Maidwell* (*c*). Certainly the former of theſe caſes has been much obſerved upon; and was not approved in *Rereſby* v. *Newland* (*d*): but the latter has been followed. *Gerard* v. *Gerard* (*e*), *Staniforth* v. *Staniforth* (*f*). In *Butler* v. *Duncomb* (*g*) there was an expreſs proviſion for raiſing the portion after the commencement of the term. Thoſe caſes were very ſtrong. In *Pierpoint* v. *Lord Cheney* (*h*) the queſtion was, whether intereſt ſhould be raiſed by mortgaging a reverſionary term. The principle to be extracted from all the caſes is, that, unleſs ſomething appears upon the face of the inſtrument to poſtpone the raiſing of the portion, it is to be raiſed, though out of a rever-

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(*a*) 1 *P. Will.* 707. See 709.
(*b*) Sir *T. Jones*, 201.
(*c*) 1 *Salk.* 159.
(*d*) 2 *P. Will.* 93.
(*e*) 2 *Vern.* 458.
(*f*) 2 *Vern.* 460.
(*g*) 1 *P. Will.* 448.
(*h*) 1 *P. Will.* 488.

ſionary term. *Ravenhill* v. *Danſey* (*a*). *Brome* v. *Berkeley* (*b*); in which caſe it was refuſed; becauſe the maintenance, which was to precede the portion, was not to commence, until the eſtate of the truſtees ſhould take effect in poſſeſſion. *Hebblethwaite* v. *Cartwright* (*c*) before Lord *Talbot*; who was Counſel in moſt of the preceding caſes before Lord *Macclesfield*. *Stanley* v. *Stanley* (*d*), *Hall* v. *Carter* (*e*). *Stevens* v. *Dethick* (*f*) turned upon the diſtinction taken in *Brome* v. *Berkeley*. *Lyon* v. *The Duke of Chandos* (*g*). In *Smith* v. *Evans* (*h*) Lord *Northington* adopted the ideas of thoſe Chancellors, who had refuſed it, and of thoſe, who had done it; and obſerved, that the inconvenience of a younger child ſtarving for want of his portion is as great as the injuring the eſtate of the eldeſt ſon by raiſing the portion out of the reverſion. The laſt caſe is *Lady Clinton* v. *Lord Robert Seymour* (*i*); in which the Maſter of the Rolls obſerves, that Lord *Macclesfield* in *Pierpoint* v. *Lord Cheney* thought himſelf bound to raiſe the maintenance, if the infant wanted it; and only directed the inquiry to ſee, whether it would be for her benefit, and would leave ſufficient for her portion. It is plain therefore, that with all this reluctance the Court has conſidered itſelf bound; where it could be ſeen, that the payment was not to be poſtponed. The reſult is, that the Court muſt find ſomething to reſiſt the application of this doctrine. The objection, upon which the Court have heſitated, the father having been tenant for life in moſt of the caſes, does not exiſt in this. No time being limited for payment of the portion, and the term commencing upon the father's death, it would carry intereſt from that time. The queſtion in all the caſes has been with the perſon entitled to the eſtate, contending, that raiſing it by anticipation would be an injury to him. Theſe caſes have no analogy to this; in which the defendant is entitled to an eſtate tail, not to commence, till this portion is paid. What principle of equity is there for poſtponing the raiſing of this portion to his eſtate tail? It appears by the anſwer that all the incumbrances, the ſubject of the prior truſts, have been paid, except 12,500 *l.*; and that might have been paid long ago by the rents and profits; and then this ſum of 30,000 *l.* would have been the firſt charge. The plaintiff only

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(*a*) 2 *P. Will.* 179. (*b*) 2 *P. Will.* 484. (*c*) *For.* 31.
(*d*) 1 *Atk.* 549. (*e*) 2 *Atk.* 354. (*f*) 3 *Atk.* 39.
(*g*) 3 *Atk.* 416. (*h*) *Amb.* 633. (*i*) *Ante*, vol. 4. 440.

desires

1801.

Codrington v. Lord Foley.

deſires the arrears of intereſt from 1795; to which time it was paid; and that the intereſt may be raiſed from four to five *per cent.*

Upon the ſecond point, there is nothing amounting to a waiver of the right. The plaintiff acquieſces in the repreſentation, that he can have neither principal nor intereſt, till the prior truſts are ſatisfied: but that repreſentation is founded in miſtake; and therefore cannot affect the right. A waiver preſuppoſes an admiſſion of the right: but it was repreſented to him, and underſtood by all parties, that he had no ſuch right. Afterwards, when his right was diſcovered, he calls upon them. It ought to be ſhewn, that being aware of his right he contracted to give it up: but the evidence amounts only to this, that he acquieſced in that untrue ſtatement without inquiry.

Mr. Manſfield and Mr. Lewis for the defendant—Upon the firſt queſtion, with reſpect to the inconvenience, there is no fund for the intereſt; and as to the principal, nothing could be more ruinous than raiſing this portion by this reverſionary term. It is to be poſtponed, not to the end of the term of 99 years, but to the period, when the prior truſts ſhall be ſatisfied; which truſts are very peculiar. This portion is to be raiſed by ſale or mortgage, by the common words: but it is impoſſible to obtain a mortgage, and a ſale muſt be extremely diſadvantageous. Nothing could be raiſed during Lord *Foley*'s life; and till thoſe truſts are ſatisfied, he could not be entitled to any thing. There is no more difficulty in ſuppoſing, the teſtator would ſhut out his granddaughter, than his ſon, till thoſe debts ſhould be paid. In the courſe of the next year all the debts remaining will be paid; and then Lord *Foley* ſuffering a Recovery can pay the portion without embarraſſment. All the queſtions in thoſe caſes aroſe upon the circumſtance, that the parent was living; and it is curious to obſerve, upon what circumſtances they turned: every Lord Chancellor regretting, when conſidering himſelf bound to raiſe the portion. Great diſcretion is repoſed in the truſtees as to all except the ſcheduled debts. After thoſe are paid, the incumbrances will be no more than the inſtalments of 8,000 *l.* a year for a few years, and a clear fund will remain beyond that of ſeveral thouſands. The intention was, that, whenever the condition of the fund was ſuch as to leave ſufficient diſincumbered for payment of this portion, then the portion ſhould be raiſed; and it could not be intended to be raiſed, until the fund ſhould be ſufficiently diſincumbered.

Upon the queſtion of waiver the plaintiff agreed to wait, at leaſt till Lord *Foley* ſhould be of age: his Solicitor and Conveyancer having the will before them. Under theſe circumſtances will the Court do this contrary to that agreement; when Lord *Foley* will be of age in a few months: no fund now exiſting: every guinea of the rents and profits, except what is abſolutely neceſſary for maintenance, being appropriated to the debts? The legacy of 5,000 *l.* is evidence againſt this attempt.

July 27.

Lord Chancellor (after ſtating the caſe very particularly)—Under theſe circumſtances the plaintiffs ſay, they are entitled to have this ſum of 30,000 *l.* raiſed, with five *per cent.* intereſt. If they can ſucceed in having it raiſed, by the effect of raiſing it they will of courſe receive five *per cent.*; for at preſent money cannot be got at four *per cent.* the ordinary intereſt of the Court. The claim is reſiſted upon two grounds: 1ſt, That under the effect of the will they are not entitled at preſent to have this ſum raiſed, nor to have the intereſt either at four or five *per cent.* paid; founded upon this farther objection, that the truſts of the terms of 99 years and 101 years are not yet ſatisfied; and though the intereſt will run on, while thoſe truſts are unſatisfied, yet that neither principal nor intereſt can be raiſed, till thoſe truſts are ſatisfied.

The ſecond objection is, that if according to the rules of the Court, independent of the circumſtances of the plaintiff's conduct, he is entitled to have that ſum raiſed and the intereſt paid, yet, attending to the circumſtances of his conduct prior to and during the treaty of marriage, one part of the terms of the contract is, that this ſum ſhould not be raiſed; and with a view to the convenience of the eſtate under all the circumſtances at the time of the marriage he entered into a contract, bargaining not to have that ſum raiſed nor the intereſt paid, till the truſts of thoſe terms are ſatisfied.

As to the latter ground, I am perfectly ſatisfied upon the anſwers and the evidence, that it is impoſſible to ſuſtain that ground of defence. The whole of the caſe upon that amounts ſimply to this; that every party in that treaty took it for granted, that the effect of the will was, that this money could not be raiſed; and the plaintiff's conduct comes to no more than this; that ſuch a repreſentation being made to him, and thoſe, who adviſed him, underſtanding it ſo, he expreſſed his willingneſs to marry, notwithſtanding that part of Mrs. *Codrington*'s fortune could not come into poſſeſſion, till the truſts of thoſe terms ſhould be ſatisfied. There is no ground to impute a breach of contract to the plaintiff in filing this bill. It will be more accurately repreſented by putting it thus; that if he was entitled to it, no one aſked him to give it up: if it was matter of doubt, it was not the intention of the parties to contract upon it as matter of doubt, and to decide in the contract the doubt as againſt Mr. *Codrington*: but they all took it for granted, there was no power in the truſtees to raiſe this; and therefore there could be no title in him to call for it. The propoſal was made on the one hand under that perſuaſion; and under that perſuaſion, as matter of perſuaſion and not of contract, the marriage was had.

The cauſe was argued, and very ably, with reference to a great number of caſes, which have not a very direct application to the queſtion furniſhed by this particular will. Moſt of thoſe caſes, I may ſay, all of them, were caſes, in which the queſtion was, whether the portion was to be raiſed without prejudice to ſome life eſtate antecedently limited and then exiſting. Previouſly to the caſe of *Corbett* v. *Maidwell* (*a*) there had been ſome caſes, which have been treated in ſubſequent caſes as very ſtrong: particularly *Greaves* v. *Mattiſon* (*b*); with regard to which I obſerve in *Corbett* v. *Maidwell*, Lord *Cowper* does not ſeem in any degree to diſapprove of it. He lays down the rule thus:

"1ſt, That though a term is limited in remainder to commence
" after the death of the father, yet if the truſt is to raiſe a portion
" payable at the age of eighteen or day of marriage, without

(*a*) 1 *Salk.* 159.

(*b*) *T. Jones*, 201. See Mr. *Cox*'s note to *Butler* v. *Duncomb*, 1 *P. Will.* 453. and the note, *ante*, vol. 2. 481. and *Lady Clinton* v. *Lord Robert Seymour*, *ante*, vol. 4. 440.

"queſtion the daughter ſhall not wait the death of her father; "but at the age of eighteen or marriage may compel a ſale of the "term."

"2dly, So it is, if the truſt of a term for raiſing daughter's "portions be limited to take effect, in caſe the father dies without "iſſue male by his wife, and the wife die without iſſue male, "leaving a daughter, in ſuch caſe the term is ſaleable in the life "of the father."

Lord *Cowper* doubted, whether he could have gone ſo far, in caſe the matter were *res integra*. He then ſtates the reaſoning, upon which that was founded; that by the death of the mother the poſſibility of iſſue male was extinct; that all, that was contingent, had happened; and then ſtates *Greaves* v. *Mattiſon*; in which caſe, I take it to be clear from the context, the remainder to the firſt ſon in tail male was to the firſt ſon by that marriage.

But in *Corbett* v. *Maidwell* the portions were to be raiſed for daughters, who ſhould be unmarried or not provided for at the death of their father. Lord *Cowper* ſays, they could not be raiſed; for all the contingency had not happened; and it could not be determined till the death of the father, who was entitled. He makes no remark in diſapprobation of *Greaves* v. *Mattiſon*; which is very ſtrongly obſerved upon in ſubſequent caſes by Lord *Macclesfield*. In one caſe, I think, he aſcribes to it the term "nonſenſe." In another he ſpeaks of the convenience and inconvenience. Lord *Cowper*'s obſervation as to that is, that it would be to no purpoſe for any one to make deeds, if the argument of convenience or inconvenience ſhould prevail to overrule them. Several deciſions were made afterwards by Lord *Macclesfield*; who ſeems to diſapprove any inclination but a leaning to lay hold of any circumſtances to diſappoint the claim to have the portion raiſed in the life of the father. He appears to have been much influenced by arguments of policy as to convenience and inconvenience; and he ſtates converſations, impertinent enough, which he ſuppoſes young ladies to hold with their fathers. Lord *Hardwicke* follows him to the full extent; if he does not go beyond it; and both of them ſeem to depart from Lord *Cowper*'s concluding obſervation by giving great effect to arguments of convenience and inconvenience. Lord *Hardwicke* however in *Stanley* v. *Stanley* (*a*) lays down the rule thus:

> “If there be a term for years, or other eſtate, limited to truſtees for raiſing portions for daughters, payable at a certain time, which is become a veſted intereſt, they ſhall not ſtay till the death of the father and mother, unleſs ſome intention appears to poſtpone it; and if there does, the Court will always take notice of ſuch intention, and poſtpone it accordingly; and the latter caſes, as *Broome* v. *Berkeley*, 2 *Wms.* 484. and others, ſhew, the Court will lay hold of very ſmall grounds, that ſpeak the intent of the parties to hinder the raiſing the portions in the life of the father and mother.”

Lord *Hardwicke* ſeems to have adopted very much Lord *Maccleſfield*'s opinions, or rather thoſe of Lord *Trevor*; who, it ſeems from the converſation between him and Lord *Maccleſfield*, ſtated 3 *Atk.* 42. thought, Lord *Maccleſfield* went too far. Lord *Hardwicke* felt all the inclination to narrow the rule; as Lord *Trevor* expreſſed it: but with that inclination he lays down the rule in *Stanley* v. *Stanley*; as I have ſtated it.

According to *Foreſter* 32. Lord *Talbot* thought this the true rule; that it depends upon the particular penning of the truſt; and he agrees with Lord *Cowper*; that if all the contingencies had happened, the portion muſt be raiſed, notwithſtanding the inconvenience, or there would be an end of deeds. Lord *Northington* follows him; and expreſſes his approbation of all, that the Court had done in all times; for in *Smith* v. *Evans* (*b*) he expreſſes in a degree an approbation of the general rule, and of the deciſions, which upon ſmall circumſtances have formed departures from it. He adviſes, that the Court ſhould adhere to both; doubting, whether thoſe latter deciſions ſhould have been made.

In *Conway* v. *Conway* (*c*) Lord *Thurlow* is made to ſay this:

“Where a man gives portions, charged on a term to ariſe upon the death of a party, it ſhews, that they are not to be paid

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(*a*) 1 *Atk.* 549. (*b*) *Amb.* 633. (*c*) 3 *Bro. C. C.* 267.

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"till after the death of that party; and that though it be upon "attaining twenty-one or marriage, yet that it can only be, "where the term ſhall come into exiſtence."

Upon looking at my own brief in that cauſe and to other caſes I am ſatisfied, Lord *Thurlow* never did expreſs himſelf in the words there attributed to him; which appear to contradict all the authorities. That doctrine is directly contrary to that of Lord *Cowper*, Lord *Hardwicke*, and what all the caſes, whether proceeding upon ſufficient circumſtances denoting intention, or not, do in effect ſay; that there muſt be ſome circumſtances in the will or ſettlement, denoting the intention to take the caſe out of the general rule; which is, that the portions ſhall be raiſed at the days or times limited, unleſs the will or ſettlement contain circumſtances indicating an intention, that they are not to be raiſed at thoſe days or times.

In Lady *Clinton*'s caſe (*a*) Lord *Alvanley* expreſſes himſelf thus (*b*):

"But notwithſtanding the numerous caſes upon this point, in "moſt of which the party contending for the portion or maintenance has ſucceeded, it is now perfectly ſettled, and the more "modern caſes have clearly eſtabliſhed, and it appears to have "been the opinion of Lord *Macclesfield*, who always found fault "with what his predeceſſors had done, but always went as far as "they did, that the Court will lay hold of any words, from which "it can be fairly inferred, that it was not the intention to charge "a reverſionary term with raiſing portions in that manner, which "muſt bring infinite inconvenience upon the reverſioner; and if "upon the context of the ſettlement any thing can be collected, "by which it may appear, that it could not be the intention of "the parties to raiſe them in that way, the Court is extremely "eager to lay hold of that. That has been uniformly laid down "by Lord *Cowper*, Lord *Macclesfield*, and all their ſucceſſors."

Upon this general ſtate of the doctrine of the Court it appears to me, that the proper rule is that Lord *Talbot* ſtates; that the

(*a*) *Lady Clinton* v. *Lord Robert Seymour, ante*, vol. 4. 440. (*b*) *Ante*, vol. 4. 460.

raiſing or not raiſing muſt depend upon the particular penning of the truſt and the intention of the inſtrument. I do not think, the Court ought to be eager to lay hold of circumſtances. The Court ought to hold an equal mind, while conſtruing the inſtrument; and I cannot agree with what is ſaid in *Stanley* v. *Stanley*, that very ſmall grounds are ſufficient. If they are ſufficient to denote the intention, they are not ſmall grounds; if they are not ſufficient to denote the intention, the Court does not act according to its duty by treating them as ſufficient; thereby diſappointing the true intention of the inſtrument.

The rule upon the whole depends upon this; whether it was the intention of the parties to the inſtrument, attending to the whole of it, that the portion ſhould or ſhould not be raiſed in this manner; taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raiſe portions at the age of twenty-one or marriage, if there is nothing more, and the intereſts are veſted, and the contingencies have happened, at which the portions are to be paid, the intereſt is payable, and the portions muſt be raiſed in the only manner, in which they can be raiſed: that is, by mortgage or ſale of the reverſionary term. It appears to me, that this caſe is diſtinguiſhable from all theſe caſes in this circumſtance; that this is not attempted to be raiſed with any prejudice to the life eſtate of the parent. Therefore if the policy of a provident or improvident marriage would apply in other caſes, it would not here; for it is clear as to the children of all the ſons none of them can call for their portions in the lives of their fathers: the ſum depending upon the appointment of the father by deed or will; which therefore might not become effectual till his death; and the proportions and reſtrictions, in and under which they are to take the ſame, and the times, muſt alſo depend upon the will of the father. Therefore, if the truſts of theſe terms were ſatisfied, ſtill the portions could not be raiſed. There is no pretence of inconvenience as to the policy of marriage, or with regard to the enjoyment of the life eſtate, or the eſtate tail; for that muſt alſo have commenced in poſſeſſion, before any child could claim the portion.

This will does not provide for a great many caſes, that might, and ſome of which did, happen. The perſon, who drew the will, undertook a taſk ſo difficult, that it was hardly poſſible ſufficiently to execute it. The teſtator meant to give to the truſtees of the terms of 99 years and 101 years a power of providing for the creditors of his two ſons; excluding from all intereſt in the premiſes compriſed in thoſe terms the creditors and his eldeſt and ſecond ſons. Whether he meant, that creditors of every deſcription ſhould have the benefit of it, that annuity creditors by liquidating their demands into a principal ſum ſhould have the benefit of it, it is not uſeful now to conſider; for the words are ſufficient to enable the truſtees to provide for ſuch creditors. But he forgot, that his firſt named deviſee was his eldeſt ſon and heir at law; and if the eldeſt and ſecond ſons and the creditors were to have no intereſt, it was not adverted to, that the law would create an intereſt ſomewhere. Notwithſtanding this therefore, the creditors found, they could either compel the truſtees to provide for them, or there was a reſulting truſt for the eldeſt ſon; and if he did not take under the deviſe, he would take in that way; and ſo they might come at their debts, whether the truſtees choſe they ſhould be paid, or not. That raiſed ſome ſuits very embarraſſing in expence, that led to the arrangement made by the truſtees. The teſtator alſo forgot another caſe, that might happen; that Lord *Foley*, *Edward Foley*, and *Andrew Foley*, might all of them die within two or three years after the teſtator; leaving a great number of younger children. Certainly it was not adverted to, if that caſe had happened, how they were to be provided with their portions; regard being had to the powers of the truſtees of the terms of 99 years and 101 years to provide for all theſe creditors. Whether it was thought, that if Lord *Foley* and *Edward Foley* ſhould die, the truſtees would do well to make no proviſion for creditors, or, whether they calculated upon their living, until the creditors ſhould be ſatisfied by the application of the rents; in which caſe there would be no embarraſſment, becauſe the children could claim no portion in the life of either of them, does not appear. *Edward Foley* is ſtill living. Lord *Foley* is dead; and an arrangement has taken place with the annuity creditors; turning their demand into a capital ſum, to a very large amount, about 80,000*l.* The demands of the other creditors were reduced to 13,000*l.*, and the annuity creditors were reduced to about 60,000*l.*;

and theſe ſums were to be payable by inſtalments of 8,000*l.* a year. It does not appear in the cauſe, whether as againſt the tenant in tail Lord *Foley* the mode of paying the annuity creditors and the other creditors by theſe inſtalments does or does not exhauſt the whole rents and profits; whether the tenant in tail notwithſtanding this arrangement does or does not receive any income from his eſtate tail: but it is clear, the term for raiſing the portion overrides the eſtate tail; and if the intention of the ſettlement is, that the tenant in tail ſhould receive any thing, before the truſts of theſe terms are ſatisfied, *a fortiori* thoſe, who take paramount, muſt. Therefore if Mr. *Codrington* could now be anſwered, that he ſhould not receive the intereſt of the 30,000*l.* till thoſe truſts are ſatisfied, and he ſhould ſay to the truſtees, that they had applied ſome of the rents and profits to the maintenance or to any other purpoſe for the tenant in tail, he might ſay, that if they were right in aſſerting, that he could not claim either the intereſt or the principal of the portion, until the truſts of theſe terms are ſatisfied, they were wrong in that application; and he might call that back, and apply what had been ſo paid to the truſts of thoſe terms; to the intent, that thoſe terms might be cleared of thoſe truſts as expeditiouſly as poſſible for the benefit of him, entitled at all events to have the portion raiſed againſt the eſtate tail. It is clear therefore, if the bargain with the creditors has not exhauſted the whole rents and profits, the truſtees have a fund, that he has a right to have applied to his principal and intereſt, and which upon the principle of the truſtees themſelves he might have applied to the benefit of the creditors to diſcharge the truſts of the terms for his benefit. If the truſtees ſay, the creditors have no right but what depends upon their will and pleaſure, he might ſay, their will and pleaſure has determined, that he muſt have it, by ſaying, the creditors ſhall not; for it is clear, the truſtees cannot keep it; and it remains to be diſpoſed of, as if there was no direction. It is clear therefore, they are wrong in their own principle: but they have dealt rightly as to the tenant in tail; the will giving theſe reſpective eſtates for life to the three ſons; giving powers in their lives to provide for the younger children at their deaths a fund, that according to the expreſs terms of the will in the caſe of Lord *Foley* would carry intereſt, and upon the rules of the Court would carry intereſt as to the children of the other tenants for life, having become veſted, when they had occaſion for them, *viz.* upon attaining twenty-one or marriage, and which by the rules of the Court would ſink, if they did not attain thoſe periods (*a*); and providing in the caſe of *Andrew Foley* in the ſame manner as with reſpect to the others; and as to him, it is clear, there is no term overriding his life eſtate, and no power for jointuring, *&c.* interpoſing. It is clear, the teſtator meant the portions to veſt immediately upon the death of *Andrew*, if the children had occaſion for them. A ſtrong inference ariſes from that, that he did not mean to poſtpone the portions of the children of the two eldeſt ſons, till the truſts of thoſe terms were ſatisfied: the management being committed to the truſtees; who might by an arrangement, that would not defeat the purpoſe, provide for thoſe creditors, if they thought proper. There is alſo a ſtrong inference from this; that in a given event *Andrew Foley* was to come into the ſituation of *Edward* as to the eſtates deviſed to *Edward*, and as to his powers of jointuring, raiſing portions, *&c.* It is true, he is not by that deveſted of his original eſtates. He remains owner of them with the powers originally given to him. But the teſtator never meant, that if *Andrew* came into *Edward*'s ſituation, he ſhould not have thoſe powers as to thoſe eſtates, till after theſe truſts are ſatisfied, but with regard to his original eſtates he ſhould have thoſe powers.

Upon the whole, the intention was, that theſe portions ſhould be payable at ſuch ages, days, and times, as Lord *Foley* ſhould appoint; and that power precludes all arguments of inconvenience and impolicy, and the poſſibility of its interfering with his life eſtate. But his giving that power to Lord *Foley* and directing intereſt till that time, at which Lord *Foley* ſhould fix the principal to be paid, and the thing being a portion, is demonſtrative of his intention, that, notwithſtanding the truſts of thoſe terms are not ſatisfied, the portion was veſted at ſuch time as Lord *Foley* ſhould appoint after the deceaſe of Lord *Foley*, carrying intereſt in the mean time.

There is much leſs inconvenience in this caſe than in holding the doctrine in *Corbett* v. *Maidwell* and *Stanley* v. *Stanley*; for

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(*a*) *Pearce* v. *Loman*, *ante*, vol. 3. 135. Mr. *Cox*'s note to *The Duke of Chandos* v. *Talbot*, 2 *P. Will.* 6.2.

there the rule was laid down, as applying to a life eſtate; out of the rents and profits of which the intereſt of the portion could not be ſatisfied, but muſt accumulate againſt the reverſion. That is not the caſe here; for the teſtator has given 6,000*l.* a year to Lord *Foley* and *Edward Foley*. The reſt of the rents and profits of their life-eſtates are left, as far as he could as to the diſpoſal of them, to the abſolute diſcretion of the truſtees; and they might collect, that it was poſſible, that Lord *Foley* and *Edward Foley* might die, before any arrangement could be complete; and therefore as to the powers under theſe terms they had to manage an arrangement, which ought to provide for the younger children and the eldeſt equally of Lord *Foley* and *Edward Foley*; and it was in their power to make an arrangement with the creditors, that would leave them the means of providing for theſe portions in events, that might have happened; without which ſome of theſe children muſt have ſtarved; and others have been doomed to that pittance, which was never intended to be all they ſhould take.

The caſe is within the rule, as laid down in the books; and alſo the payment prayed by the bill is directed by the expreſs letter of the truſt; and in a caſe, in which it is not owing to the effect of the will, but to ſomething done by virtue of it, if there ſhall be heaped upon the reverſioner accumulated intereſt, and there are no circumſtances, (ſmall circumſtances and ſmall grounds are words I do not like to hear in any Court) denoting, that it was the intention, not only, that the plaintiff ſhould wait for her portion to the laſt hour of her life; but alſo in a caſe, in which I am bound to ſay, if that was the intention, the teſtator muſt alſo have intended to ſtarve the repreſentatives of the two firſt branches of his family in a caſe, that might have happened.

Therefore according to all the caſes and all the diſtinctions the plaintiff is entitled to intereſt, to the time, at which it is paid; that is, to 1795, and to have this portion raiſed.

Declare, that the plaintiff is entitled to have the portion raiſed, with intereſt at 4 *per cent.* before the filing of the bill and intereſt at 5 *per cent.* from the filing of the bill. I give no coſts upon this bill. The bill to reſtrain the raiſing of the money muſt of courſe be diſmiſſed with coſts.

I have found a note in a book I happen to have, 1 *Eq. Caſ. Abr.*, that belonged to Mr. *Brown*, who was a great practitioner in this Court, in the margin in his handwriting, upon the Report of *Butler* v. *Duncomb*. I obſerve it the rather, becauſe Mr. *Cox* in his note upon that caſe having uſed the induſtry of examining the Regiſter's book, ſays, it appears, the ſum of 3,000*l.* was divided by agreement. Mr. *Brown* ſays, he had heard Lord *Talbot* ſay often, that upon the rehearing of *Butler* v. *Duncomb* the portion was directed to be raiſed; but he had heard Lord *Hardwicke* ſay as often, that though upon the rehearing it was directed to be raiſed, that was by an agreement for the purpoſe; and it was ſo directed by conſent.

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A ſtatement of property written by the teſtator, and his books of accounts, admitted as evidence, that he conſidered as his property, and meant to diſpoſe of, property, not ſtrictly, though in ſome ſenſe, his: *viz.* mortgages and leaſes, the property of his wife under a will, by which he was executor with her before marriage.

Proviſions by a marriage ſettlement not held a purchaſe of all the property of the wife; unleſs that purpoſe is expreſſed, or clearly imported.

A proviſion by marriage ſettlement in lieu, bar and ſatisfaction, of all dower or thirds, which the wife might otherwiſe be entitled to out of all the real and perſonal eſtate, held to bar her intereſt in what was not diſpoſed of by the will of her huſband.

Whether an agreement by a huſband for a leaſe of part of his wife's term will bind her after his death, as an actual leaſe does, and if ſo, whether the rent is his property, or ſurvives to her with the reverſion, *Quære.*

SAMUEL DENISON by his will, dated the 26th of *November* 1792, reciting, that by ſettlement previous to his marriage with *Lucy Deniſon* 4,000*l.* 4 *per cent.* Bank Annuities, 3,000*l.* Reduced Annuities, and 3,000*l.* *India* Annuities, were ſettled, ſo that *Lucy Denniſon* in caſe of ſurviving her ſaid huſband would be entitled to the whole, and that he had covenanted to ſecure to her the further ſum of 160*l.* *per annum* for life out of ſuch other real and perſonal eſtate as he ſhould die poſſeſſed of, confirmed the ſettlement, except as to that covenant; in lieu of which he directed his executors to purchaſe 10,000*l.* 3 *per cent.* Conſolidated Bank Annuities, upon truſt for his wife for life, with remainders over after her deceaſe to his niece *Mary Gaſon* and her children. He alſo gave his wife a houſe and furniture for her life, a legacy of 200*l.* and ſome ſpecific articles. After ſome other ſpecific deviſes and legacies he directed an eſtate to be ſold, and the purchaſe money with the reſidue of his real and perſonal eſtate to be converted into money, upon truſt as to the intereſt and dividends

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of one equal moiety thereof for his widow for life; and after her deceaſe he gave the principal to *Samuel Price Deniſon*; and the other moiety he gave to *Mary Gaſon* for life; and after her deceaſe the principal to her children.

By a codicil, dated the 26th of *May* 1795, unatteſted, the teſtator declared that his nephew *Samuel Price Deniſon* ſhould not have or be entitled to receive or take any thing under his will or otherwiſe out of his eſtate or effects.

The bill was filed by the teſtator's widow, his executrix, and two executors, to have the accounts taken and the rights aſcertained. The cauſe coming on for further directions after the accounts and inquiries, the next of kin claimed what was not diſpoſed of; *viz.* a moiety of the perſonal eſtate; of which the bequeſt was revoked by the codicil.

One queſtion upon the Report was, of what the reſidue of the perſonal eſtate conſiſted. The next of kin inſiſted, that not only the teſtator's own property, but alſo, that, which his wife at the time of her marriage or during her coverture was entitled to in any manner, muſt be taken to belong to him. It did not appear, that any thing came to her after marriage with the teſtator: but the property, to which ſhe was entitled at her marriage, was a mortgage for 2,600*l.* upon two houſes in *Harley* ſtreet; which ſhe took as reſiduary legatee of her aunt *Lucy Hammond:* a mortgage for 200*l.* upon another houſe; which was her property in the ſame manner; and ſeveral leaſehold houſes; which alſo ſhe took as reſiduary legatee of her aunt; and a contingent intereſt in a moiety of a legacy of 2,000*l.* Old South Sea Annuities, expectant upon the death of *Martha Hammond* without iſſue.

The next of kin contended, that this property muſt be conſidered as the teſtator's; firſt, upon the ground, that he became the purchaſer of what his wife was poſſeſſed of, or entitled to, at her marriage by the ſettlement then made upon her: 2dly, That he did ſufficient acts to reduce this property into poſſeſſion: 3dly, That he conſidered this property as his own; and therefore ſhe muſt elect.

Upon the ſecond ground the Report ſtated, that this teſtator and his wife before their marriage, as joint executors of Mrs. *Hammond*, executed a bond to *Mary Hammond* for the payment of 2,000*l.*, the amount of her legacy under that will, and took from her a releaſe of the legacy; and the teſtator in his books of account of the executorſhip charged Mrs. *Hammond*'s eſtate with the payment of the ſtamp; and ſtated the funds remaining ſubject to the truſts of her will to be the 2,600*l.* mortgage by *Lyſter*, ſubject to *Mary Hammond*'s legacy of 2,000*l.*; that he received the rents of the houſes; accounted for the ſame to the mortgagors, after deducting the intereſt; out of which he paid the intereſt of the bond; that he alſo granted leaſes of the leaſehold property belonging to his wife; in ſome inſtances granting the whole term, in others leaving a reverſion; as to ſome executing actual leaſes, as to others, only agreements for leaſes.

As to the third ground the Report ſtated, that a paper, written by the teſtator, was found at his death among his papers in a box at his chambers, together with his will (*a*), entitled thus;

"Statement of my property 26th *November* 1792 when I made "my will."

The teſtator then in this paper enumerated his freehold, copyhold, and leaſehold, eſtates, including thoſe of his wife, and his bonds, mortgages, and other ſecurities, omitting only the contingent legacy; and in the laſt clauſe he noticed the mortgage, belonging to his wife before marriage, thus;

"*Harley* Street mortgage: annual intereſt 30*l*: principal 600*l.*"

That mortgage together with ſeveral other ſecurities (*b*) was claſſed under this deſcription:

"General perſonal eſtate applicable to the payment of debts "and legacies."

(*a*) It was ſtated as a fact at the Bar, that this paper was found in his will.

(*b*) A ſum of 200*l.* was inſerted; which during the hearing was ſuppoſed to be the mortgage for that ſum, his wife's property; but it appeared afterwards, that it was another ſum: and that mortgage was not noticed in the paper.

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The Maſter therefore certified, that the teſtator meant to appropriate the ſaid mortgaged premiſes towards the payment of the bond in diſcharge of his general perſonal eſtate.

As to the choſes in action of the teſtator's wife the Maſter certified, that at law, independent of any equitable bar, ſhe was entitled to the mortgages of 2,600 *l.* and 200 *l.*; and in the ſame manner to the reſidue of the terms, beyond the leaſes granted: but he found, that in the ſaid paper all the above mentioned leaſehold eſtates were ſet down as part of the teſtator's leaſehold property. He alſo found, that at her marriage ſhe was under the will of *Lucy Hammond* entitled to receive a moiety of the legacy of 2,000 *l.* in caſe *Martha Hammond*, niece of *Lucy Hammond*, ſhould die without iſſue; and that *Martha Hammond* was living, and unmarried. No act by the teſtator was found as to that.

Upon the other queſtion, the next of kin contended, that Mrs. *Bowzer*, who was the teſtator's widow, was excluded upon the words of the ſettlement; by which ſhe agreed to accept and take the proviſion thereby agreed to be made for her in lieu, bar and ſatisfaction, of all dower or thirds, which ſhe might otherwiſe be entitled unto out of all the real and perſonal eſtate of the teſtator.

Mr. Romilly, Mr. Hart, and Mr. Heald, for the plaintiff Mrs. Bowzer—Upon the queſtion as to the mortgages, the teſtator having done no act to reduce the choſes in action of his wife into poſſeſſion, this private memorandum can have no effect. What equitable circumſtances are there, to which the report alludes? His wife being beneficially intereſted, his being executor with her can make no difference. If he had made a ſettlement in conſideration of what ſhe brought to him, or with a view to his becoming entitled, then he would be in equity entitled as a purchaſer; but it is impoſſible to contend, that any ſuch intention can be collected from this ſettlement. Therefore to theſe mortgages of 2,600 *l.* and 200 *l.* Mrs. *Bowzer* having ſurvived her firſt huſband is entitled.

It is impoſſible for her certainly to avoid taking upon herſelf the bond debt. The bond was given by the two executors: but the teſtator taking no beneficial intereſt muſt be conſidered as giving it for the benefit of the other executor. She muſt therefore pay that debt.

Next, as to the leaſehold eſtates: the Report is right, that the reverſion, under-leaſes having been granted, ſurvived to the wife. Lord *Coke* ſtates (*a*), that if a man be poſſeſſed of a term of forty years in the right of his wife, and maketh a leaſe for twenty years, reſerving a rent, and die, the wife ſhall have the reſidue of the term: but the executors of the huſband ſhall have the rent; for it was not incident to the reverſion; for that the wife was not a party to the leaſe. A queſtion perhaps may be made, whether ſhe was not entitled to the rent. Lord *Coke* there ſtates, that the rent would belong to the huſband: but there is a note of Lord *Hale* againſt that. The caſe there referred to is reported in *Popham*: but the paſſage, to which Lord *Hale* refers, does not appear. It is clear however, ſhe will be entitled to the reverſion of the leaſehold property after the expiration of theſe leaſes; unleſs her huſband can be conſidered as a purchaſer. The Maſter has conſidered an agreement for a leaſe as a leaſe: but that is only a declaration of an intention; which he has never actually executed. That, which is intended to be done, is not to be conſidered as done between huſband and wife, under theſe circumſtances. For that there muſt be ſome equitable circumſtances; making it incumbent upon the perſon claiming the property to give effect to the intention. No caſe has occurred between huſband and wife upon the intention to reduce her choſe in action into poſſeſſion. If therefore, as far as actual leaſes were made by the huſband, reſerving rent to him, the property was ſo far made his, thoſe reſting only in agreement belong to her. The principle is, that the huſband has a right to diſpoſe of the chattel real of his wife, and to reduce her choſe in action into poſſeſſion: but he muſt do the act: he muſt aſſign: contract will not do. If he had ſued for her choſe in action, and died pending the action, even after judgment, the action or judgment would ſurvive to her. The entries in the teſtator's books can have no effect to reduce theſe choſes in action into poſſeſſion. The reduction into poſſeſſion muſt be during his life. Even a diſpoſition by will

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(*a*) *Co. Lit.* 46. *b*.

cannot have that effect: much leſs a paper not teſtamentary. The material queſtion is, whether the wife is precluded by the ſettlement from taking her ſhare of the reſidue; into which the ſpecific bequeſt to *Samuel Price Deniſon* muſt fall. The ſettlement ſtates, that the proviſion of 160*l.* a year, in the place of which the will ſubſtitutes an intereſt in 10,000*l.* ſtock for her life, is to be in lieu, bar and ſatisfaction, of all dower or thirds out of his real and perſonal eſtate. It will be ſaid upon this, ſhe could not take any thing in caſe of inteſtacy out of his perſonal eſtate. That proviſion was made with a view to children, to bar her claim upon the perſonal eſtate in the caſe of an inteſtacy, there being children; for a third of the perſonal eſtate is not the portion, to which ſhe is entitled in the event, that has happened: there being no children. In that caſe ſhe is entitled to a larger portion. The ſettlement, being made upon marriage, looked to the other event. The expreſſion "dower or thirds" is conſidered applicable to real eſtate. If the intention had extended farther, he would have ſaid "any diſtributive ſhare." *Cleland* v. *Cleland* (*a*). *Garforth* v. *Bradley* (*b*). *Salway* v. *Salway* (*c*).

Mr. Manſfield, Mr. Pigott, Mr. Richards, Mr. Alexander, Mr. Stanley, Mr. Steele, and Mr. Pemberton for the next of kin—The plaintiff Mrs. *Bowzer* takes a very large bounty by this will; and muſt elect. The paper produced in this caſe is clearly cotemporary with the will; in which reſpect it is diſtinguiſhed from the late caſe of *Pole* v. *Lord Somers* (*d*). This teſtator ſpeaks of the paper as the ſtatement of his property at the time of his will; and it is very emphatical. With reſpect to the under-leaſes there is no doubt, they operate as an aſſignment of ſo much; and the huſband is entitled to the rent. That is the clear doctrine from Lord *Coke;* and notwithſtanding the note of Lord *Hale* there is no doubt as to the reaſon of it. It is a ſale of part; and he might have ſold the whole. As to an agreement for a leaſe, an agreement in this Court is a leaſe. A mere agreement to be executed for valuable conſideration would be enforced againſt remainder men behind, though deriving nothing from him. As againſt himſelf his agreement is as good as his leaſe, and even, as againſt her ſurviving, both would be bound to perform the agreement; which is an act, to which he was competent during the coverture. Then

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(*a*) *Prec. Ch.* 63.

(*b*) 2 *Veſ.* 675.

(*c*) *Amb.* 692.

(*d*) *Ante*, 309.

taking a ſhare of the aſſets ſhe ſhall not ſay, they ſhall be diminiſhed by her refuſing to perform the agreement. If the huſband agreed to pledge her choſe in action for his debt, or otherwiſe dealt with it, could ſhe inſiſt upon her rights, merely becauſe a legal conveyance was not executed? If this Court would enforce ſuch a contract, they will conſider ſuch an exerciſe of ſubſtantial dominion over the property, ſuch a dealing with it, as putting her right out of the queſtion. He might have aſſigned it without conſideration. In *Comyn's Digeſt* (*a*) it is laid down, that if a huſband poſſeſſed of a term for years in right of his wife leaſes for a leſs term, and for the ſecurity of money borrowed of his leſſee covenants to make him another leaſe after the end of the former, the wife ſhall be bound thereby; for this covenant amounts to a diſpoſition of the eſtate in Equity purſuant to the power in her huſband. *Steed* v. *Cragh* (*b*), *Bates* v. *Dandy* (*c*).

As to the paper, we muſt refer to the argument of *Pole* v. *Lord Somers*. In *Pulteney* v. *Lord Darlington* (*d*) upon the queſtion as to the 20,000*l.*, whether to be conſidered real or perſonal eſtate, Lord *Thurlow* received in evidence the accounts of the ſteward of General *Pulteney*; in which that ſum was mentioned as part of the perſonal eſtate. Lord *Thurlow*'s deciſion was, that that ſum was at home; and there was no purpoſe to be anſwered by laying it out in land. That account having been received in evidence, *à fortiori* muſt this paper; for nothing can apply more to the purpoſe at the time of making the will: the teſtator putting in what is his perſonal eſtate; affording the moſt diſtinct evidence, that he conſidered this his property, when he made his will. This caſe, which is very ſingular, is not exactly like *Hinchcliffe* v. *Hinchcliffe*; which is a caſe of ſatisfaction; and therefore, as your Lordſhip obſerved in *Pole* v. *Lord Somers*, there could be no doubt, that the evidence was admiſſible. But this caſe is much more like *Pulteney* v. *Lord Darlington*. The paper in that caſe was under much leſs favourable circumſtances. It was not ſigned by him at the date of his will and with a view to it. The paper was written by his ſteward: but it was in his cuſtody; and

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(*a*) 2 *Com. Dig.* 150. *Tit.* Chancery. 2 *M.* 5.

(*b*) 9 *Mod.* 42. (*c*) 2 *Atk.* 207.

(*d*) *Reg. Lib. A.* 1773. Fol. 710. Cited *ante*, 314. in *Pole* v. *Lord Somers*; *ante*, vol. 3. 521. in *Hinchcliffe* v. *Hinchcliffe*.

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it appeared, that he ſome way acted upon it in making his will; and the queſtion was, whether a ſum of money, which he had the power of making real or perſonal eſtate, ſhould be conſidered real or perſonal upon that evidence. In this caſe the teſtator had it in his power to make this property his or hers. This is a much more favourable caſe than *Pole* v. *Lord Somers.* The teſtator there had no power to make the property his own; as this teſtator and General *Pulteney* had. This paper ſhews the clear intention at the date of the will. It appears from the indorſement, that the paper and the will were written upon the ſame day.

As to the right of the plaintiff to the perſonal eſtate, ſhe is deprived of dower and all right to any ſhare of the perſonal eſtate in all events. The word " thirds" is only the common expreſſion uſed in ſuch ſettlements, generally applied to real eſtate, rarely to perſonal; where the object is to make a complete bar of any right in the wife by marriage out of the eſtate of her huſband. No diſtinction, whether there ſhall be children or not, is intended. Some expreſſions in the clauſe ſettling the 160*l.* a year ſhew, that was all ſhe was to take. It is declared to be the meaning, that at all events, if ſhe ſurvives him, ſhe ſhall have that ſum of 160*l.* a year. The argument as to the event ſuppoſed to have been in contemplation, whether there ſhould be children, or not, cannot apply as to the dower. In either event ſhe will be barred as to the real eſtate; and though looſely expreſſed, this muſt be as much a bar as to the perſonal eſtate. The ſettlement is in ſatisfaction of all her rights as a widow. *Walker* v. *Walker* (*a*).

Mr. Romilly in reply—The queſtion as to the paper is the ſame as that in *Pole* v. *Lord Somers.* It is perfectly clear, this paper was written after the will: how long after, does not appear. If this is relied on, as declaratory of his intention, it ought to be proved as teſtamentary. That could not be in *Pole* v. *Lord Somers*; that paper being written after the will, and directed not to be annexed to it. Then it muſt be only evidence; and parol evidence might as well be received. It is ſaid, independent of that paper, he acted upon the property as his own: but it appears only, that he meant to conſider it as his own as far as it was his

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(*a*) 1 *Veſ.* 54. See *Pickering* v. *Lord Stamford*, *ante*, vol. 2. 272. 581. vol. 3. 332. 492.

in right of his wiſe, not his to all intents and purpoſes. His receipt of the rent is conſiſtent with that limited intereſt. He had a beneficial intereſt in it, and power to diſpoſe of it, if he choſe, during the coverture; and it is to be remembered, that he was himſelf a lawyer. It is neceſſary to ſhew by clear, unequivocal, acts, that he meant it to be his, and to go to his repreſentatives.

The queſtion as to the agreements is very difficult. The paſſage in *Comyns*'s *Digeſt* cites the very worſt authority. The agreement is enforced againſt the heir in caſes of dower; becauſe the heir repreſents the anceſtor: but that doctrine is never applied to the caſe of huſband and wife. Many analogous caſes ſhew, that ſuch an intention will not do. If a huſband ſues for his wife's choſe in action, a much ſtronger indication of intention, and obtains judgment, but dies before execution, it will ſurvive. So it will in the caſe of an arbitration, and death before award. This bears a much ſtronger reſemblance to the execution of powers. Will the Court aid a defective execution of a power againſt a wife for the benefit of a ſtranger? She does not repreſent him in this reſpect. It is a right to diſpoſe of her property: he attempts to diſpoſe of it by an ineffectual act. Upon what principle is a Court of Equity to execute it? The execution of a power by a tenant for life would perhaps be enforced againſt the reverſioner in favour of a purchaſer for valuable conſideration. That is the only caſe, that bears any analogy to this: but would it, if defectively executed? Has the Court ever enforced an agreement for a leaſe againſt the remainder man? It is ſuppoſed, an agreement for a leaſe would of itſelf make a caſe of election: but there is no inſtance of carrying the doctrine of election ſo far.

As to the other queſtion, the plaintiff's right to a diſtributive ſhare, the ground is, that it appears, the parties were very anxious to make a proviſion for children of the marriage; and they ſeem not to have had in contemplation any other event.

Lord CHANCELLOR—The queſtion whether ſuch a paper can be admitted in evidence, which I ſtudiouſly avoided in *Pole* v. *Lord Somers*, muſt now be decided. This caſe is more favourable for admitting it; the paper in that caſe being drawn up long after the will. It is alſo leſs liable to objection than the account in *Pulteney* v. *Lord Darlington*; this paper being written by the teſtator himſelf.

As to the actual leaſes, at this day there is no doubt, that to the extent of the terms the huſband actually granted he became owner. As to the agreements for leaſes my apprehenſion at preſent is, that in this Court he is alſo to be conſidered owner of thoſe intereſts. If he aſſigns his wife's choſe in action, he gives no legal title to it. It is by agreement in moſt caſes of choſes in action that the aſſignee takes it. His covenant is in this Court a diſpoſition of it, that could be enforced againſt him; and as againſt him at leaſt would go to the repreſentative of the perſon agreeing with him. If it cannot be enforced againſt his wife, he will be anſwerable upon his covenant; and then the queſtion is, whether the wife can claim. Upon the head of election that fact of the agreement ſhews, he treated the property as his.

As to the word "thirds," the clear intention muſt be taken to mean her intereſt in caſe of inteſtacy. If that word did not occur, I doubt, whether the perſonal eſtate would not have been included under the word dower. The word "thirds" is never uſed accurately. It is a ſort of expreſſion in common parlance, deſcriptive of the intereſt upon an inteſtacy. It muſt depend upon the domicil. The plaintiff's argument is too ingenious upon the conſtruction of a ſettlement; and cannot apply, where that word is connected with "dower;" which would apply to both events, whether there are children, or not.

July 30.

Lord Chancellor—I am at preſent diſpoſed to decide this cauſe upon a ground, that does not make it neceſſary to determine the points as to an agreement for a leaſe by the huſband; and if the cauſe ſhould be reheard upon the point, on which I decide it, I ſhall wiſh, that a ſearch ſhould be made upon the point, whether it ever has been decided, that an agreement will or will not bind the wife; and, if it will, whether the rent is to be paid to her or the huſband. If that is untouched by deciſion, I think, it will be found, the analogy to other caſes will make out, that an aſſignment in equity is to this purpoſe as good as an aſſignment at law. But I ſay that without prejudice. The principle is ſtated, without ſaying any thing as to the authority of the caſe, towards the concluſion of *Steed* v. *Cragh*.

As to the other points, firſt, whether the ſettlement was a purchaſe of the wife's fortune, upon ſo much of the caſe as appears to me I do not think it was. According to the modern caſes it is eſtabliſhed, that the ſettlement for that purpoſe muſt either expreſs it to be in conſideration of the wife's fortune; or the contents of it altogether muſt import that; and plainly import it, as much as if it was expreſſed. That is the reſult of the caſes upon the ſubject; and it is not worth while to conſider, in what reſpect the older caſes are unſatisfactory; involving inquiries not very eaſy to execute.

As to the actual leaſes, I adhere to the opinion, that they were an alienation by the huſband. As to the queſtion, whether the ſettlement was a bar of the wife's intereſt in any undiſpoſed reſidue, I abide by my opinion, given yeſterday, that it was the intention of the parties, and that is ſufficiently manifeſted by the language of the ſettlement, though inaccurately expreſſed, in the events, that have happened, to purchaſe out the wife's intereſt in the undiſpoſed reſidue. The queſtion then is, whether the leaſehold intereſts paſſed by the will; and the 600*l.* remaining of the mortgage for 2,600*l.* after clearing the legacy of 2,000*l.*; which unqueſtionably was the primary charge upon it, and the bond of the executor and executrix only a collateral ſecurity. If therefore the mortgage has become the huſband's, he muſt exonerate her from that engagement: ſo, if it became the wife's, ſhe muſt exonerate him from the bond. Then the queſtion is, whether under the circumſtances the 200*l.* mortgage and the leaſes are to be conſidered as paſſing under the effect of the reſiduary clauſe of his will. The ſettlement not being to be conſidered a purchaſe of her fortune, the teſtator muſt be conſidered entitled in right of his wife to the poſſeſſion of theſe leaſes and mortgages; entitled to the poſſeſſion not only as huſband, but alſo, as he and ſhe were executor and executrix, to ſuch poſſeſſion, as he would have in that character. In a certain ſenſe therefore this property was his, in right of his wife, and as far as it was capable of being conſidered his as executor with her; and if ſhe had died firſt, independent of the effect of the ſurvivorſhip to him as huſband, ſuppoſing, any other perſon had been entitled to this property in remainder after her life, it would have been his as truſtee for that perſon, in the ſenſe, in which a truſtee can call the truſt property his. If he had paid the bond, which he and his co-executrix, whom he afterwards married, entered into for the payment of the legacy of 2,000*l.*, the mortgage of 2,600*l.* would have been his to the extent of making good the demand by virtue of that payment againſt the aſſets of the teſtatrix. After the marriage by his books, which muſt be evidence, if the paper is evidence, he treats the mortgages of 2,600*l.* and 200*l.* as his, but as his in right of his wife. With reſpect to the leaſehold eſtates the teſtator had with regard to thoſe premiſes, of which he had made actual leaſes, acquired conſiderable intereſts in the ſtricteſt ſenſe his. As to thoſe premiſes, to which the agreements apply, he had attempted at leaſt to acquire intereſts in the ſtricteſt ſenſe his; and as to the reſidue of thoſe intereſts he retained them in the ſenſe, in which I have repreſented him to have had intereſts previouſly to thoſe leaſes and agreements, as huſband and as executor with his wife. At his death thoſe intereſts would ceaſe; and all not effectually diſpoſed of would ſurvive to his wife. His will therefore is certainly to be conſtrued with regard to this circumſtance; that it begins to ſpeak at the moment, when thoſe reſiduary intereſts were no longer his in any ſenſe: but it is to be remembered, that at the date of the will they were his in a ſtrict ſenſe to the extent of his own acts, and in ſome ſenſe beyond that. It would be difficult to ſay, the perſuaſion one has as an individual, that he was providing by expreſs acts in his will for all his wife ſhould have, would be ſufficient to bar her from taking, not under his acts and proviſions, but by virtue of her own title. If therefore ſhe is to be barred from claiming the reſidue of theſe terms and the mortgage intereſts, it muſt be, not by the effect of the expreſs proviſions for her, but by the diſpoſitions in favour of other perſons; and that cannot be, unleſs under all the circumſtances by the words "my perſonal eſtate" he can be held to mean to paſs that, which was his in ſome ſenſe, but not in a ſtrict ſenſe. If that can be done, it will of courſe raiſe a caſe of election.

I had great difficulty upon this queſtion in *Pole* v. *Lord Somers*; and I make this deciſion, as bowing to authorities, which it is my duty to follow, rather than as being ſatisfied, that upon the rules of evidence, as they were formerly underſtood, this paper can be admitted in evidence. If it could not, there would not be much injuſtice; for I am upon reflection ſtrongly diſpoſed to hold, that, if the conſtruction of the words "my perſonal eſtate" will not paſs the property, and the paper cannot be let in, the Eccleſiaſtical Court would be inclined to receive it as teſtamentary, notwithſtanding ſome of the contents; for their principle ſeems to be, that if the teſtator by a ſubſequent paper ſays, he has bequeathed by a former inſtrument, that, which he has not bequeathed, they will hold that ſubſequent paper a diſpoſition, as being a declaration of his will at the time he made it to diſpoſe by the will; not in terms expreſſing, that it is then his will, but that he has diſpoſed of it before. If therefore the paper could not be received as evidence in this Court, they ought to have an opportunity of propounding it to the Eccleſiaſtical Court as a teſtamentary paper.

If a teſtator by a paper ſubſequent to his will ſays, he has bequeathed that, which he has not bequeathed, that paper may be proved as teſtamentary; and the property will paſs.

Upon the queſtion of evidence, this, though written, is in a ſenſe parol; and it ſeems, as far as *dicta* go, that parol evidence ought to be received upon a latent ambiguity, not upon a patent ambiguity; that it ought to be received to rebut Equities founded upon preſumption, and perhaps to ſupport the preſumption; to ouſt an implication; and to explain, what is parcel of the premiſes granted or conveyed. As to a patent ambiguity, I do not ſee, how you can eaſily apply thoſe caſes to a caſe propoſing to ſhew, that the words "my perſonal eſtate," which have in them no patent ambiguity, have in this ſenſe a latent ambiguity; that he meant that, which is in no ſenſe his perſonal eſtate. When a man deviſes to his ſon *John*, and happens to have two ſons of that name, ſuppoſing one to be dead, there is a latent ambiguity, letting in parol evidence, but parol evidence perfectly conſiſtent with the deſcription in the inſtrument. From thoſe caſes therefore it cannot be collected, that by a deviſe of his eſtate, parol evidence may be admitted to ſhew, that he was deviſing another man's eſtate.

Parol evidence admiſſible upon a latent, not upon a patent, ambiguity, to rebut Equities, grounded upon preſumption, and perhaps to ſupport the preſumption, to ouſt an implication, and to explain, what is parcel of the premiſes granted or conveyed.

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As to the caſes upon preſumption of ſatisfaction of portions, if a teſtator means to ſatisfy a debt by covenant or otherwiſe, the inſtrument creating the debt is not conſtrued againſt the import of it, nor the inſtrument ſatisfying it: but a preſumption of law is raiſed from the connection between the parties, that he means to ſatisfy the debt. In *Hinchcliffe* v. *Hinchcliffe* the parol evidence was let in with great propriety, to ſhew, that the teſtator by acts done had diſpoſed of all the property ſettled, and by the effect of the diſpoſition had made himſelf a debtor to his children. Then this Court would conſtrue the will preciſely as if he had been originally a debtor. He had diſpoſed of the property; and received the money; and had got in his pocket that money; which was in a ſenſe his. The debt affected all his eſtate; and therefore the Court held upon the preſumption ariſing between father and child, when the parol evidence had proved the circumſtances of the property, conſtituting the child a creditor upon the father, that the father was upon the principles of this Court underſtood to mean to ſatisfy the debt. So, in the caſe of portions, where the father is not ſtrictly debtor; where, for inſtance, he is tenant for life, and the portions attach upon the family eſtate, upon principles a little difficult perhaps to ſuſtain at firſt, but now eſtabliſhed perfectly, it was held, that the father was purchaſing for the family eſtate; and giving the portion, intending to ſatisfy the debt of the family, as in the other caſe intending to ſatisfy the debt from himſelf. Therefore evidence is let in to meet the preſumption; and then evidence muſt be let in to fortify the preſumption. But I am apprehenſive, that the Court did this in old caſes with much more jealouſy than in later caſes. There was a time, when the Court was very jealous of admitting parol declarations, except thoſe, that paſſed about the time of the will; and it appears from what Lord *Hardwicke* ſays in *Blinkhorn* v. *Feaſt* (*a*) and what is ſtated in *Maſcal* v. *Maſcal* (*b*) with regard to the caſe there cited, that the time of making the declarations is very material (*c*). There are ſtrong traces of a diſpoſition in theſe and other caſes not to lean with all the attention, that has been given in late caſes, to declarations before or after, and particularly at a great diſtance after, the will.

(*a*) 1 *Veſ.* 27.

(*c*) 2 *Veſ.* 323.

(*c*) See *ante*, vol. 1. 359. in *Nourſe* v. *Finch*, and *Hornſby* v. *Finch*, *ante*, vol. 2. 72. *Clennell* v. *Lewthwaite*, *ante*, vol. 2. 465. 644.

Then are the caſes of election to be governed by the ſame principles as caſes of ſatisfaction? Moſt of the latter go upon this principle; that where a father or any one elſe is in the character of a debtor, attending to this, that in ſome circumſtances the Court will preſume an intention in a father, which they would not in the caſe of another perſon, the Court ſays, the diſpoſition of what is ſtrictly his property ſhall ſatisfy the debt; and no violence is done by that. But upon election all the caſes ſay, you muſt make out, that he deſcribes the ſubjects, of which he means to diſpoſe. The queſtion then is, whether the teſtator has ſo deſcribed the ſubject; and if not, whether you can let in parol evidence, *primâ facie* applicable, to prove, though he has uſed words not ſo deſcriptive, they ſhall be taken to be deſcriptive. That there is authority for that at this day, whatever difficulties occur upon it, as an hypothetical propoſition, I dare not deny. The difficulties upon it are great. In *Pulteney* v. *Lord Darlington* the teſtator had 20,000 *l.* in his hands; for which he was debtor to the truſts of the ſettlement. That ſum was *primâ facie* real eſtate in his hands. He was tenant for life; and all the real uſes of a ſtrict ſettlement attached upon it. His ſteward put down upon paper, that this ſum of 20,000*l.* was part of his eſtate. Suppoſe the caſe to ſtand nakedly upon that, and he makes his will the ſame week, and, *à fortiori*, if four or five years after receiving that account, it would be very ſtrong to ſay, that becauſe the ſteward apprehends that to be his maſter's property, the maſter knows nothing to the contrary; and his ideas muſt be the ſame; and he muſt uſe the terms in his will in the ſame ſenſe as the ſteward uſed them. But to ſay that, not only to make that conſtruction againſt the perſons intereſted in the money upon the will, but alſo to hold, that the teſtator never corrected his idea between the time, when he ſaw the paper, and the time of executing the will, and againſt thoſe, who have intereſts to be diſplaced by proof, is very ſtrong. If there is in the will an indication, that ſome part of that property was meant to be diſpoſed of *eo nomine* by the will, that is ſtrong to ſhew, he did mean to diſpoſe of ſome property in a ſtrict ſenſe not his own; and it may be argued upon that, that he meant to diſpoſe of the whole property ſubject to the ſame uſes. But even that preſſes a great deal againſt thoſe, who have intereſts, to be diſplaced by proof; and it is competent at leaſt to ſay, that having ſhewn an intention to diſpoſe of part he does not neceſſarily mean to diſpoſe of the reſt. But the circumſtance, to which I advert, is, that *de facto* that paper was admitted as evidence; and that is a judgment of this Court upon the admiſſibility of evidence, and that judgment recognized in the higheſt place.

It is impoſſible alſo not to admit, that Lord *Alvanley* has in the ſtrongeſt words ſaid (*a*), that evidence of this ſort is to be admitted, and upon the authority of that very caſe; and there is nothing, that abates from the authority of that *dictum*, except that, as I underſtand the caſe, that *dictum* does not belong to it. Lord *Alvanley* refers to what Lord Chief Juſtice *De Grey* ſaid in *Pulteney* v. *Lord Darlington*. If the circumſtances were evidence, that they made an impreſſion upon the great mind of that learned Judge, is very conſiderable. But the difficulty I have is, upon what principle he ſuffered thoſe circumſtances to make an impreſſion upon his mind. Baron *Eyre* goes a great deal farther; ſaying, he does not agree to the poſition laid down in the general ſenſe of it; that, where a man gives all his eſtate, he does not mean to give what is not his: what he thinks his is, in the ſenſe he uſes the words, his.

Theſe principles being ſo laid down in *Pulteney* v. *Lord Darlington*, and *Hinchcliffe* v. *Hinchcliffe*, it is not for any one ſitting here upon any embarraſſment ariſing in his own mind to deny their application: but I repeat, that I do not underſtand theſe *dicta*; as far as they ſay, upon caſes of election evidence is admiſſible, but not to explain the will. If they mean, that it is admiſſible only to explain the ſubjects of bequeſt ambiguouſly deſcribed, and then not to explain the will, but to make you underſtand, what ſubjects the teſtator meant to deſcribe, which upon the face of the will you cannot underſtand, that is intelligible: but, if they mean, that it is admiſſible to prove, what the teſtator meant by the words "my perſonal eſtate," and that he meant a great deal more than thoſe words would carry by their natural or legal import, and if a caſe of election is raiſed upon that, in fact and ſubſtance evidence is admitted to raiſe a caſe of election, thereby explaining the will. It is not enough for me to ſay, that is

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(*a*) *Ante*, vol. 3. 530.

is the effect of it; for upon reaſoning of a contrary tendency the Court has eſtabliſhed, that this ſort of evidence has been admitted.

The other caſes cited in *Hinchcliffe* v. *Hinchcliffe* have no relation to it: *Elliſon* v. *Cookſon* (*a*), and all the others upon preſumption and ſatisfaction, for the reaſons I have ſtated; and all I can find is one or two *dicta* of Lord *Thurlow* in *Jeacock* v. *Falkener* (*b*) and *Fonnereau* v. *Poyntz* (*c*). The former, it is to be obſerved, is a caſe of ſatisfaction. Lord *Thurlow* is there made to ſay, "evidence cannot be read to prove, what the teſtator meant "by the words uſed in his will: but it may as to facts, upon "which the teſtator made his will." Mr. *Lloyd* upon that cited the caſe of *Broughton* v. *Errington* (*d*); and, I believe, it was upon the argument of that caſe that my mind was impreſſed with the diſtinction. That caſe is intelligible: but the words attributed to Lord *Thurlow* are not. The declarations were let in upon the old ground: but what is meant by the latter part of that propoſition, I do not underſtand. If I am to collect it from what Lord *Thurlow* ſays in *Fonnereau* v. *Poyntz*, which is ſubſequent to his own deciſion in *Pulteney* v. *Lord Darlington*, Lord *Thurlow* there (*e*) ſays, he lays out of the caſe all declarations of the teſtatrix of what ſhe really meant to give at the time of making her will, and all ſtatement of her property, from whence it might be inferred, what ſhe meant. Upon what ground then did he admit the evidence? As I have always underſtood, and now underſtand it from this Report, upon this ground; that the teſtatrix having given, as a ſpecies of ſtock, that, which was of no known denomination of ſtock, the will ſhewed, ſhe meant to give ſomething; but did not aſcertain the ſubject ſhe meant to give. Therefore Lord *Thurlow* looked at the property, in order to prove, what ſhe meant; the will proving, that ſhe meant to give ſomething; but the deſcription of the ſubject not being intelligible. That was not contradicting any deſcription in the will. It was not ſaying, that was the perſonal eſtate of the teſtatrix, which was not her perſonal eſtate; but, that ſhe meant by theſe words what ſhe might be taken to mean; becauſe upon the words, at-

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(*a*) 3 *Bro. C. C.* 61. *Ante*, vol. 1. 100.

(*b*) 1 *Bro. C. C.* 295.

(*c*) 1 *Bro. C. C.* 472.

(*d*) 7 *Bro. C. C.* 12.

(*e*) 1 *Bro. C. C.* 477.

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tending to the different ſpecies of ſtock at the bank, it could not be aſcertained, what ſpecies ſhe did mean: it being clear, that ſhe meant ſome. That caſe therefore in no degree ſupports *Pulteney* v. *Lord Darlington*, nor the *dictum* at the concluſion of *Hinchcliffe* v. *Hinchcliffe*: nor does it carry the old caſes upon parol evidence one tittle farther than they had gone.

Then the queſtion is, can I admit this paper as evidence? That queſtion ariſes in a caſe, in which this property was more or leſs ſtrictly the perſonal eſtate of the teſtator in all the ſenſes I have repreſented, independent of evidence: the teſtator having by actual leaſes acquired out of his wife's property perſonal eſtate of his own, having by agreements for leaſes acquired ſuch intereſts as thoſe agreements would give them, having conſtituted himſelf, if he ever ſhould pay the bond debt, a creditor upon his wife's choſe in action, and in that reſpect made that his own, and, beyond thoſe intereſts, acquired by his own acts, having his wife's perſonal eſtate in this ſenſe his, in right of his wife, whether in ſuch a complicated ſituation it is poſſible to admit parol evidence, that by the words "my perſonal eſtate" he meant, not only his ſtrictly, but alſo that, which in a ſenſe muſt be admitted to be his perſonal eſtate; attending to the fact, that a great portion of this property he muſt be entitled to diſpoſe of; becauſe he had made it in a ſtrict ſenſe his. If the queſtion was new, I ſhould doubt, whether in a caſe ſo circumſtanced it would be a violation of the rule to admit evidence; for it is not a contradiction of the will; but only goes to this; that, as he might mean the words in the one ſenſe or the other, he did mean that property, which in both ſenſes was his. But it is not neceſſary to decide upon that ground; for after the caſe of *Pulteney* v. *Lord Darlington*, and what Lord Chief Juſtice *De Grey*, Baron *Eyre*, and Lord *Alvanley*, have ſaid, whatever my own opinion might have been prior to *Pulteney* v. *Lord Darlington*, (and I agree with Lord *Roſslyn*, that I cannot ſee, upon what principle the evidence was admitted in that caſe) after all this authority, I do not think myſelf at liberty to reject this paper as evidence. It is with great ſatisfaction, that receiving it I find, it is evidence co-temporary with the will; for it leaves as little to hazard as can be in ſuch a ſort of caſe. It may be ſtated as a fact, that the moment the teſtator had made his will he ſat down to ſtate the effect of it. This paper has the ſame date. He calls it a ſtatement of his property. He correctly abſtracts the will; including all the leaſehold eſtates, as his own, the mortgage for 2,600 *l.*; eſtimating it at only 600*l.*, the reſidue beyond the legacy charged upon it; the 200*l.*; and, what is very remarkable, leaving out the contingent legacy; which never produced any thing to him. That, from which he derived actual benefit, he takes as his own; and what was contingent, whether to be received by his wife, or not, he leaves out.

Under theſe circumſtances, and ſubject to any review, if it can be found fit to attempt to ſhake theſe authorities, I am of opinion, the teſtator did bequeath all this as his own perſonal eſtate. If ſo, the other points will not ariſe; and I am the more ſatisfied upon the juſtice of the deciſion; becauſe, though I do not think, Lord Chief Juſtice *De Grey* was correct in allowing circumſtances to make an impreſſion upon his mind, if they never ought to have found their way to his mind, this paper muſt either be looked at as evidence, or the party ought to have the opportunity of propounding it as a teſtamentary paper to the Eccleſiaſtical Court.

This cauſe was not reheard. Before the decree was drawn up, it appeared that the mortgage for 200 *l.* was not contained in the paper. The ſum of that amount was another ſum belonging to the teſtator. That mortgage was therefore excepted.

It was ſaid at the Bar, that there was no trace of *Steed* v. *Crab* in the Regiſter's book; and that it appeared from the Regiſter's book, that in *Pulteney* v. *Lord Darlington* all ſorts of papers were read: agreements of ſolicitors; caſes and opinions of counſel, &c.

1801.

Rolls.
June 8. 30.

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Truſt by will for building or purchaſing a chapel, where it may appear to the executors to be moſt wanted: if any overplus, to go towards the ſupport of a faithful goſpel miniſter, not exceeding 20*l.* a year; and if any farther ſurplus, for ſuch charitable uſes as the executors ſhould think proper. The whole truſt void, not only as to the real eſtate and a mortgage, but alſo as to the perſonal eſtate; and the real eſtate went to the heir at law; and the perſonal to the next of kin.

ELIZABETH BROOKES by her will, dated the 21ſt of *June* 1776, after giving, among ſeveral other legacies, if there ſhould be any poor relations of hers at the time of her deceaſe, as far as the ſecond, that can be ſaid to be in want, 5*l.* to each, and directing all her wearing apparel to be diſtributed among her poor relations at the diſcretion of her executors, gave all the reſt and reſidue of her eſtate and effects whatſoever, freehold and otherwiſe, to her executors, after payment of the above legacies and her funeral expences, for the purpoſe of building or purchaſing a chapel for the ſervice of Almighty God; and gave her two ſmall ſilver waiters, her large ſilver cup, and her beſt damaſk table cloth and two damaſk napkins, for the uſe of the Communion table of the ſame; and requeſted, that her bureau-book-caſe with all her books may be depoſited in the ſaid chapel; and deſired, that the chapel may be, where it may appear to her executors to be moſt wanted; and if any overplus ſhould remain from the purchaſing or building the ſame, ſhe requeſted, that it might go towards the ſupport of a faithful goſpel miniſter, not to exceed the ſum of 20*l.* a year; and if after that any farther overplus ſhould remain, ſhe deſired, that the ſame may be laid out in ſuch charitable uſes as her executors ſhall think proper; and ſhe appointed the reverend *Richard Hill* and *Thomas Chapman* her executors. The latter was one of five legatees of 20*l.*; and to the former ſhe gave 10*l.* for his trouble.

The teſtatrix died upon the 12th of *June* 1800. *Hill* having renounced, *Chapman* proved the will; and filed the bill; praying an execution of the truſts of the will.

The heir at law by his anſwer claimed the real eſtate; and the next of kin claimed, the perſonal eſtate.

Mr. Richards and Mr. Hart for the heir at law, and next of kin—This is ſuch a deviſe and bequeſt, as the Court will not execute. It is clear as to the land. As to the perſonal eſtate, it is given ſo, that an inveſtment in land muſt neceſſarily have been in the contemplation of the teſtatrix. If the words are to be confined to building a chapel, ſuppoſing the ground to be already furniſhed, a caſe upon that point is now depending before the Lord Chancellor. In the argument of that caſe *The Attorney General* v. *Tyndall* (*a*) was cited; in which Lord *Northington* againſt the general courſe of preceding caſes held, that the application of perſonal eſtate to building already in mortmain ſtill is amortiſing. A propoſition directly contrary to that is broadly laid down in *Corbyn* v. *French* (*b*); *viz.* that it may be applied for the purpoſe of ameliorating, beautifying, ſuſtaining or repairing, buildings upon land already in mortmain. The Lord Chancellor wiſhed to have the point more conſidered, than it could have been as a ſhort cauſe. But in this caſe it is clear, the teſtatrix intended land to be procured. Land already in mortmain cannot meet her idea of purchaſing. She had no idea of land under ſuch circumſtances; intending a diſtinct charity of her own.

The diſtinction of Lord *Hardwicke* is ſtated in *The Attorney General* v. *Naſh* (*c*) and many other caſes, collected in *Highmore*; that erecting a chapel is conſidered as founding the thing; building, otherwiſe. But it is always conſidered a queſtion of conſtruction. *Foy* v. *Foy* (*d*) had two bequeſts in it; of which one was conſidered good: the other, not. Lord *Kenyon* ſaid, he would have declared both void; if there had not been an hoſpital exiſting. Here is no chapel exiſting. Then as to the diſpoſition of the ſurplus, the Court cannot take notice of that; becauſe the firſt diſpoſition cannot take effect. *The Attorney General* v. *Goulding* (*e*). This goſpel miniſter muſt according to her intention be attached in ſome way to this chapel. The firſt purpoſe not being warranted, the ſecond muſt fail with it. If the chapel cannot be purchaſed, you cannot fix upon any ſurplus to apply to any miniſter: the reſidue being the ſurplus upon an account, to aſcertain the ſum neceſſary for the purchaſe of the chapel; which account cannot be taken. How can it be deſcribed to the Maſter, how much will be wanted for the building: a building of what value? The whole fund cannot be applied to the miniſter; for

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(*a*) *Amb.* 614. (*b*) *Ante*, vol. 4. 418. See page 427. (*c*) 3 *Bro. C. C.* 588.
(*d*) Cited 3 *Bro. C. C.* 591. (*e*) 2 *Bro. C. C.* 428.

that is not the intention. It is acknowledged in all the authorities, that if the firſt object fails, that, which is dependent upon it, muſt fail. *Moggridge* v. *Thackwell* (*a*) is a very ſtrong caſe: but is now to be reheard (*b*). The Maſter muſt then ſay, who is the miniſter to have the 20*l.* a year for ever. The additional bequeſt is not diſtinct, but connected with the general deſign of charity. By eſtabliſhing the ſtipend alone the Court will go againſt the intention; which was, that a miniſter of her own ſhould have it: that not being the main object: but only for the purpoſe of providing a miniſter to do the duty of the chapel. There is a mixture of vanity in this, as in all theſe caſes.

Then, as to the point, whether the Crown will be entitled to apply the reſidue to any charitable purpoſe, this will does not afford a ſufficient ground for that. In *Moggridge* v. *Thackwell* the particular object was pointed out by the will.

Mr. Nolan for the Attorney General in ſupport of the charity—This diſpoſition is not void, except as to the real eſtate and the mortgage (*c*). All theſe objects are legal. It muſt be admitted, that it would be void, if the truſt was merely to purchaſe a chapel: but being for the purpoſe of either building or purchaſing, in the alternative, if the purpoſe of building can be ſupported, the Court will give effect to that mode, which may be eſtabliſhed. If therefore this can be ſuſtained as a bequeſt for the purpoſe of building upon land already in mortmain, or if land ſhould be given, it may be eſtabliſhed. The diſcretion given to the truſtees as to the ſituation of the chapel, where it may appear to them to be moſt wanted, is ſtrong in ſupport of this charity. *The Attorney General* v. *Naſh* and all the other caſes eſtabliſh this; that where that diſcretion is given, if the truſtees can exerciſe it in a legal manner, the Court will carry it into effect; where it is poſſible to apply it upon land already in mortmain.

But if that is void, the other diſpoſition is valid. If the miniſter was to exerciſe his function in the chapel, according to *The Attorney General* v. *Whitchurch* (*d*) and other caſes, the principal failing,

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(*a*) 3 *Bro. C. C.* 517. *Ante*, vol. 1. 464.

(*b*) Upon the rehearing the decree was affirmed. *Poſt.*

(*c*) *Howſe* v. *Chapman, ante*, vol. 4. 542.

(*d*) *Ante*, vol. 3. 141.

failing, the adjunct muſt alſo fail. But in this inſtance there is nothing to connect them. Her bounty to the miniſter is limited to 20*l.* a year; importing clearly, that he muſt be ſupported by other means. The appointment ſhould be by the executors, or by reference to a maſter. As to the ſurplus, this is a condition precedent. A bequeſt may be void in one part, and good in the limitation over: *The Attorney General* v. *Hartley* (*a*). All the caſes upon the doctrine of *Cy pres* go upon this principle; that, where it is evident, ſome diſtinct object of charity ſhould take place, before the legacy ſhould lapſe, the Court will fulfill that intention. In this will the intention is clear, that the repreſentatives ſhall take nothing, but the whole ſhall go to charity, from the legacies to the relations.

July 30.

The Maſter of the Rolls Sir Wm Grant (after ſtating the caſe)—The only queſtion is with regard to the validity of the bequeſt for charitable purpoſes. It is contended for the heir at law, that as to the real eſtate the deviſe is void; and that unqueſtionably is ſo. It is alſo clearly void as to the mortgage. By the next of kin it is contended, that the diſpoſition is void, ſo far as it directs the reſidue to be laid out in building or purchaſing a chapel; and it is contended by the Attorney General on behalf of the charity, that being in the alternative, to build or purchaſe, if either of thoſe purpoſes could legally be effected, the truſt ought to be carried into execution; and that undoubtedly would be ſo. It is inſiſted, that the purpoſe to build a chapel upon ground already in mortmain is legal; though to purchaſe ground for the purpoſe of building a chapel is not legal. *The Attorney General* v. *Bowles* (*b*) was referred to, as an authority, that, if there is a bequeſt of money to be laid out in building a chapel or ſchool, the intention is to be taken to be, to build, in caſe a piece of ground al-

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(*a*) 4 *Bro. C. C.* 412.

(*b*) 2 *Veſ.* 547. Lord *Hardwicke*'s opinion upon this ſubject, as expreſſed in that caſe, *Vaughan* v. *Farrer*, and *Cantwell* v. *Baker*, there cited as *Gaſtril* v. *Baker*, comes to this; that if the object can be attained by any other means than a purchaſe of land, as by an application of the fund upon land already in mortmain, or by a gift of land, or hiring a houſe, it ſhall have effect; and in *The Attorney General* v. *Tyndall*, *Amb.* 614. the Maſter of the Rolls following Lord *Hardwicke*'s authority allowed the truſtees two years, to procure, if they could, a gift of land.

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ready in mortmain could be found for that purpoſe; and that caſe undoubtedly is an authority for that.

But this caſe appears to have been overruled by a great number of ſubſequent deciſions. Upon the principle eſtabliſhed by the caſe itſelf it ſeems a little extraordinary, that a teſtator having made no reference whatſoever to the caſe of land being already in mortmain, the Court ſhould ſuppoſe an intention, that he has not in the moſt remote degree pointed to. But Lord *Hardwicke* in favour of a charity held, that ſuch an intention might be preſumed.

The firſt caſe, in which that authority was impeached, is *The Attorney General* v. *Tyndall* (*a*) before Lord *Henley*. In a ſubſequent caſe, *The Attorney General* v. *Hutchinſon* (*b*), Lord *Bathurſt* takes Lord *Henley* to have there decidedly overruled the other caſe. In argument he certainly did overrule it; for he diſapproved of the ground, upon which that was decided: but the caſe immediately before him did not call for that deciſion; for it was not a caſe of the ſame kind. In that caſe the direction was expreſsly to purchaſe; and there was no option. But all the reaſoning of Lord *Henley* went in direct contradiction to the former caſe. He held, that the ſtatute had two objects: 1ſt, That you ſhall not give land for the benefit of a charity: 2dly, That you ſhall not realiſe for the benefit of a charity; that the miſchief is the ſame; for, if that precedent was to prevail, a piece of ground, that was only worth 50*l.* might be made worth 20,000*l.*; which undoubtedly is putting it in mortmain.

But a caſe directly in point occurred before Lord *Northington* in 1764, *Pelham* v. *Anderſon* (*c*); for there 2,000*l.* was given to build or erect an hoſpital. That was determined by him to be void. That caſe did directly overrule *The Attorney General* v. *Bowles*, the purpoſe being preciſely the ſame. Then came the caſe of *The Attorney General* v. *Hutchinſon*; to which I have before alluded, in 1775; where the bequeſt was, according to the report in *Ambler*, for the purpoſe of erecting, and, according to a note

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(*a*) *Amb.* 614. (*b*) *Amb.* 751. 1 *Bro. C. C.* 444. in a note.
(*c*) 1 *Bro. C. C.* 444. in a note.

note in *Brown*, for erecting and building a free ſchool. A ſtrong circumſtance there was, that there was in the pariſh a piece of ground in mortmain; upon which a ſchool had formerly been erected; and it was contended, that the fact was in the teſtator's contemplation; and the intention was to re-erect the ſchool upon that foundation: but Lord *Bathurſt* thought, that, as the teſtator had not himſelf pointed to that intention, it was not to be preſumed by the Court. Therefore it was to be taken as a mere bequeſt for the purpoſe of erecting or building a ſchool; and it had been determined in *Pelham* v. *Anderſon* and the other caſes, that ſuch a bequeſt was void.

Then the caſe of *Foy* v. *Foy* (*a*) occurred; which went much farther than either of theſe caſes. There the legacy was given towards the erection and endowment of an hoſpital. Lord *Hardwicke* in *Vaughan* v. *Farrer* (*b*), and *Gaſtril* v. *Baker* (*c*) held, that to erect does not neceſſarily imply to build, much leſs a purchaſe of ground for building. He held, it might mean merely an endowment: but Lord *Kenyon* in *Foy* v. *Foy* held, that, if there was no hoſpital already exiſting, that would be void.

Then came *The Attorney General* v. *Naſh* (*d*); in which the words "erect and build" occurred. The former undoubtedly is not ſo ſtrong as the other, from what Lord *Hardwicke* had held, that it might mean an endowment. Therefore in that caſe the word "build" was the operative word. But Lord *Thurlow* held the bequeſt altogether void, and allowed the demurrer.

In this caſe the alternative is to build or purchaſe. It is admitted, a bequeſt to purchaſe would be void; and it is determined by all thoſe caſes, that a bequeſt for the purpoſe of building a chapel is equally void. That bequeſt therefore falls to the ground.

The next queſtion ariſes upon the direction, that if any overplus remains after the purchaſing or building the chapel, it ſhall go towards the ſupport of a faithful goſpel miniſter, not exceeding

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(*a*) At the *Rolls*, 1ſt *February* 1785. Cited 3 *Bro. C. C.* 591. (*b*) 2 *Veſ.* 182.

(*c*) The name of the plaintiff in that cauſe was *Cantwell*.

(*d*) 3 *Bro. C. C.* 588.

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20*l.* a year. It is contended by the next of kin, that this is a bequeſt dependent upon the former; and, that failing, this muſt likewiſe fail, upon the authority of *The Attorney General* v. *Goulding* (*a*). The late Maſter of the Rolls ſeemed (*b*) to doubt a little the doctrine of that caſe in *The Attorney General* v. *The Earl of Winchelſea* (*c*): but afterwards in *The Attorney General* v. *Boultbee* (*d*) he approved of that doctrine; and acted upon it. It is then contended, that this is not dependent upon the other purpoſe; but is for the ſupport of a miniſter generally, not at that chapel. I am clearly of opinion, ſhe muſt have meant a miniſter in that chapel, which ſhe meant to be purchaſed. It would be quite abſurd to ſuppoſe, ſhe intended no proviſion for the miniſter of her own chapel; but that a proviſion ſhould be made for the miniſter at ſome other chapel, to be built by a ſtranger. Therefore upon the authority of *The Attorney General* v. *Goulding* and *The Attorney General* v. *Boultbee* that bequeſt muſt fail; as the chapel is not to have exiſtence.

Upon theſe two parts of the caſe I have had very little difficulty: but I have been a good deal embarraſſed as to the ultimate bequeſt of the reſidue, to be applied by the executors in general charitable purpoſes. Standing by itſelf, a bequeſt of a reſidue to be employed in ſuch charitable purpoſes as the executors ſhall think proper is a good bequeſt; ſuppoſing it legal to do as the teſtatrix had directed, and a reſidue had been left, after thoſe purpoſes were anſwered, there would have been a good bequeſt of it; and therefore the queſtion is, whether that ulterior bequeſt is to fail, becauſe the prior bequeſt cannot take effect. If it could be reduced to any certainty, how much would have been employed by the executors for the other purpoſes, the reſidue ought to be employed under this laſt direction, *viz.* for charitable purpoſes generally. I have conſidered, whether that can be aſcertained by a reference to the Maſter, to ſee, how much would have been ſufficient for this chapel: but upon conſideration it is quite impoſſible to give any direction, that would not be vague and indefinite, to a degree almoſt ridiculous: an inquiry, what they might have employed for building a chapel, without knowing what kind of chapel: the

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(*a*) 2 *Bro. C. C.* 428. (*b*) 3 *Bro. C. C.* 379. (*c*) 3 *Bro. C. C.* 373.
(*d*) *Ante*, vol. 2. 380. vol. 3. 220. See alſo vol. 3. 145.

teſtatrix having given no ground to aſcertain, what kind of chapel: no locality. It is utterly impoſſible to frame any direction, that would enable the Maſter to form any idea upon it. If ſhe had even pointed out any particular place, that might have furniſhed ſome ground of inquiry as to what ſize would be ſufficient for the congregation to be expected there: but this is ſo entirely indefinite, that it is quite uncertain, what the reſidue would have been; and therefore it is void for that uncertainty. She had no view to any reſidue but a reſidue to be conſtituted by actually building a chapel. She contemplated no reſidue but with reference to that. It is impoſſible to aſcertain it in the only manner, in which ſhe meant it to be aſcertained. It is impoſſible for the Court to apply it. Therefore the whole of this diſpoſition is void.

Declare the deviſe and bequeſt for theſe charitable purpoſes void; and that the real eſtate belongs to the heir at law; the perſonal to the next of kin (*a*).

(*a*) *Attorney General* v. *Davies. Poſt.*

CLARKE *v.* SETON.

July 10, 30.

No intereſt beyond the penalty of a bond; except under ſpecial circumſtances.

IN 1798 *Thomas Clarke* contracted with the truſtees under an Act of Parliament for the ſale of certain eſtates to purchaſe an eſtate, called *Peplow Hall* for 39,500 *l.* *Thomas Williams* claiming againſt the eſtate under judgments to an amount above 1,500 *l.*, the purchaſer deſired, that before the whole purchaſe money ſhould be paid, thoſe debts ſhould be diſcharged: but the truſtees having ſome doubt as to the fairneſs of the demand of *Williams*, thought it neceſſary, that it ſhould be inveſtigated. This produced a deed, dated the 4th of *Auguſt* 1798; under which 3,000 *l*, part of the purchaſe money, was inveſted in ſtock in the names of truſtees; upon truſt, in caſe thoſe judgment debts ſhould upon the 4th of *Auguſt* 1799 remain unſatiſfied, to ſell the ſtock, and ſatiſfy the debt out of the produce. The debt not being diſcharged in *January* 1800, the bill was filed by *Clarke* and one of the truſtees of the

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the ſtock againſt the truſtees for the ſale of the eſtate, the other truſtee of the ſtock, and *Williams*; praying, that the rights of the truſtees and of *Williams* in the ſtock may be aſcertained; and that an account may be taken of what is due to *Williams* for principal and intereſt upon his judgments; and that he may be paid out of the ſtock.

The debt appeared upon *Williams*'s anſwer thus:

A bond, dated the 3d of *January* 1775, for 500*l.* with a penalty of 1,000*l.*

Intereſt to the 10th of *May* 1779, 608*l.* 14*s.*

A bond, dated the 12th of *September* 1782 for 112*l.* 16*s.* with intereſt; with a penalty of 305*l.* 12*s.* Upon that bond 185*l.* 8*s.* 3*d.* was due for principal and intereſt at the time of filing the bill. Upon the former bond judgment was entered up in *Michaelmas* Term 1781. No judgment was entered upon the other bond. All claims were ſettled, except as to the bond for 500*l.*, upon which the obligee inſiſting upon the whole arrear of intereſt beyond the penalty, it became neceſſary to file the bill: the purchaſer preſſing to have the buſineſs concluded.

Mr. Richards and Mr. Bell for the plaintiffs—In *Creuze* v. *Hunter* (*a*) the late Lord Chancellor was clearly of opinion, that a judgment does not carry intereſt, if the debt in its nature does not carry intereſt; and ſaid, *Bickham* v. *Croſs* (*b*) turned upon the particular circumſtances. The ſame point was determined in *Deſchamps* v. *Vanneck* (*c*). Intereſt was not given beyond the penalty in *Sharpe* v. *The Earl of Scarborough* (*d*) and *Mackworth* v. *Thomas* (*e*). Without going into the former caſes, a ſeries of late deciſions has ſettled this point. The laſt, *M'Clure* v. *Dunkin* (*f*), upon which alone any doubt could ariſe, was determined upon the diſtinction, that the action was brought on the judgment; and Lord *Kenyon* admits, that if the action had been upon the bond, the objection would have held. That brings it back to all

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(*a*) 4 *Bro. C. C.* 157. 316. *Ante*, vol. 2. 157.
(*b*) 2 *Veſ.* 471.
(*c*) *Ante*, vol. 2. 716.
(*d*) *Ante*, vol. 3. 557.
(*e*) *Ante*, vol. 5. 329.
(*f*) 1 *Eaſt.* 436.

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all the other caſes; the reſult of which is, that there ſhall be no intereſt upon a judgment; unleſs the debt in its nature carries intereſt; upon which it is expreſsly put in all theſe caſes. It never carries intereſt in the Maſter's office. If it is ſaid the fund was producing intereſt, ſo was the land producing rent before. Perhaps the ground of refuſing to go beyond the penalty is laches. *M'Clure* v. *Dunkin* does not appear to have been much argued. There are many debts, in which damages would be given, but upon which a Court of Equity would not allow intereſt. *Lord Dunſany* v. *Plunkett* (*a*), *Audely* v. ——— (*b*), *Duvall* v. *Terry* (*c*); which was put upon delay. *Elliot* v. *Davis* (*d*). All theſe are done away in the late caſes. The diſtinction is, where a Court of Law gives intereſt as matter of contract, and as matter of damage. To that is to be referred the direction to compute intereſt upon ſuch debts as carry intereſt.

Mr. Romilly and Mr. W. Agar for the defendant Williams— The caſes cited do not bear in the leaſt upon this; this queſtion being, whether parties bringing this creditor here can take ſecurities from him upon any other terms than doing him complete juſtice. In the caſes cited the creditors were either plaintiffs, or perſons coming voluntarily into the Maſter's office upon a bill of creditors. In *Hale* v. *Thomas* (*e*) the diſtinction is taken; that, where the party is coming for relief, deſiring an injunction to prevent the creditor from uſing the ſecurities he has at law, the terms are paying what in natural equity he is bound to pay. The ſame diſtinction is alſo clearly ſtated in Equity Caſes Abridged (*f*). Caſes of that nature are perfectly eſtabliſhed; and are conſiſtent with the modern caſes. If this creditor had taken poſſeſſion by *elegit*, they muſt have come as mortgagors paying the intereſt. In *Deſchamps* v. *Vanneck*, which deciſion was certainly a ſurpriſe upon perſons of great experience, the late Lord Chanceller muſt have been miſtaken as to an action upon a judgment at law; and was miſled by the prothonotary, from whom he inquired; for that is the caſe of *M'Clure* v. *Dunkin* (*g*). In *Deſchamps* v. *Vanneck* the debt was not upon a bond, but a judgment. It would be very ſtrict to ſay, a debt upon a bond carrying intereſt in its

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(*a*) 2 *Bro. Pl.* 251.

(*b*) *Hardr.* 136.

(*c*) *Sh. P. C.* 15.

(*d*) *Bunb.* 23.

(*e*) 1 *Vern.* 349. 2 *Ch. Ca.* 182. 186.

(*f*) 1 *Eq. Ca. Ab.* 92. Pl. 7.

(*g*) In that caſe the judgment was upon a bond.

nature ſhould ceaſe to carry intereſt, becauſe a judgment has been recovered upon the bond. *Godfrey* v. *Watſon* (a) is deciſive upon this as to the judgment. But beſides this, this creditor is entitled by virtue of intereſt being made of this fund. From the time this bill was filed he would be entitled: the object of the bill being to prevent him from proceeding at law; there being a fund for paying him in equity. The fund cannot be producing intereſt for one of the parties, and not for the other. If there is any difference, the legal rule ought to be applied in this caſe; this creditor not coming with any claim upon aſſets, but being brought here for the purpoſe of preventing him from uſing his legal remedy; and therefore being entitled to every thing he could have at law.

July 30. *The Maſter of the Rolls*—The only queſtion is, how much is really due to the defendant *Williams*. For that purpoſe he is made a party to this ſuit; and he claims payment out of this fund; contending for intereſt beyond the penalty of the bond. On the other hand it is contended, that he is not entitled to any thing beyond the penalty. Upon that point I take it to be perfectly aſcertained at this day, that the penalty of the bond is the debt. I always underſtood it to be ſo at Law; and ſhould have thought, the queſtion would have been, whether it was ſo in Equity. Certainly for many purpoſes the penalty is not held to be the debt in Equity; and therefore it might have been thought, that it was not ſo in all caſes; but that the principal was the debt; and the intereſt was to be calculated upon that beyond the penalty. But the contrary is eſtabliſhed in Equity; and the uniform rule in Equity is never to go beyond the penalty. But, what would not have been expected, it has been doubted, whether that is ſo at Law; where the penalty is conſidered the only debt; and originally the party could not have been relieved againſt it at Law; but muſt have gone into Equity for relief upon payment of principal, intereſt, and coſts. In *Lord Lonſdale* v. *Church* (b) however Mr. Juſtice *Buller* doubted that doctrine; and ſaid, the old caſes were not founded upon principle; and that at Law the

(a) 3 *Atk.* 517.

(b) 2 *Term Rep. B. R.* 388.

penalty is not to be conſidered the debt; but intereſt in the ſhape of damages may be recovered beyond the penalty. If it could, it ought always to be ſo recovered; for it proceeded upon the ground, that the principal is the debt, and the penalty only a ſecurity for it. If that was eſtabliſhed to be ſo at Law, I ſhould think, it would almoſt have followed, that in Equity intereſt ſhould be calculated in the ſame manner; for upon an account of the demand of a creditor, having a legal demand, a Court of Equity can have no right to cut off any part of his demand: the only object of the account being to determine, how much he is to receive from the aſſets; and accordingly Mr. Juſtice *Buller* did not conceive, that there would be any difference in that reſpect at Law and in Equity; for in *Knight* v. *Maclean* (*a*) ſitting in this Court he held, that in Equity the intereſt ought to go beyond the penalty. Lord *Thurlow* diſſented from that; not upon the ground, that, if it was true at Law, it would not be ſo in Equity, but becauſe he thought the penalty the debt both at Law and in Equity; and he ſtated conſiderable difficulties: what was that intereſt beyond the penalty: was it a debt by ſpecialty or ſimple contract? It was wholly out of the bond. Therefore Lord *Thurlow* conceived, that at Law the penalty was the debt, and likewiſe in Equity; and decided accordingly both in *Tew* v. *Lord Winterton* (*b*) and *Knight* v. *Maclean* (*c*). In *Wilde* v. *Clarkſon* (*d*) the Court of *King's Bench* diſſented entirely from *Lord Lonſdale* v. *Church*; and in the late caſe, *M'Clure* v. *Dunkin*, Lord *Kenyon* was quite clear, that if the action had been upon the bond, nothing more could have been recovered than the penalty: but the action being upon the judgment, it was determined, that the plaintiff might go beyond the penalty.

It is clear therefore, that both at Law and in Equity the penalty is the debt. The conſequence is, this defendant is wrong altogether in this claim of intereſt beyond the penalty. But it was farther contended for him, that there are equitable circumſtances, that entitle him to have intereſt beyond the penalty; admitting the general rule to be, as I have ſtated it; and they cite caſes, *Duvall* v. *Terry* and *Lord Dunſany* v. *Plunkett*, to ſhew, that,

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(*a*) 3 *Bro. C. C.* 496.
(*b*) 3 *Bro. C. C.* 489.
(*c*) 3 *Bro. C. C.* 496.
(*d*) 6 *Term Rep. B. R.* 303.

where the party comes to be relieved, the terms may be impoſed upon him of paying intereſt beyond the penalty. In the former of theſe caſes the plaintiff came upon the ground of fraud; and the Court refuſed to relieve him, except as to the penalty. The relief was whimſical; for they relieved him againſt the penalty: but the conſequence was, that he was obliged to pay a great deal more; for then they made him pay the original debt with the intereſt; which was much beyond the penalty.

But it is unneceſſary to examine that doctrine, or that of *Lord Dunſany* v. *Plunkett*; for in this caſe no relief is ſought againſt the defendant *Williams*. He has not ſued out an *elegit*, or got an execution, which they ſeek to ſet aſide. They only deſire him to inform them, what the debt is: there being a fund, out of which they offer to pay it. That is not ſeeking relief againſt him. Nothing could poſſibly be due to him but the penalty; upon the ſuppoſition, that it was the caſe of a bond. He never inſiſted upon more by his anſwer. He does not inſiſt, as it was thrown out that he might be entitled, upon intereſt on his judgment. With reſpect to that, waiving the conſideration, that the claim is not ſet up by him, I do not ſay, there are not caſes, in which intereſt may be allowed upon a judgment, though a judgment upon the bond, and beyond the penalty. Such caſes have occurred; where there has been great delay by writs of error, *&c.* as in *Bodily* v. *Bellamy* (*a*). But it is not of courſe in every caſe. *Williams*, if he had brought an action, would not have had any claim to intereſt. He does not ſtate any delay in his way, or any reaſon to prevent him from ſuing upon the judgment at any time, ſince it was entered up. It was entirely his own fault: not like a caſe, in which there is no fee ſimple eſtate to reſort to, and he was reduced to the neceſſity of bringing an action againſt the party. In ſuch a caſe it would be very fair to allow intereſt. But there is no ground here. In no way could he have recovered any more than the ſum, for which he obtained his judgment, *viz.* the 1,000 *l.*; and he ought to have taken that ſum; which I take it from the correſpondence he might have had. Conſequently upon payment of that ſum to him he ſhall acknowledge ſatisfaction upon the judgment.

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(*a*) 2 *Bur.* 1094.

1801.
July 30.

HOLBECKE *v.* SYLVESTER.

Practice as to excepting for coſts.

THE plaintiffs filed their bill as mortgagees, and alſo for the purpoſe of having contracts carried into execution; in which latter object they failed. The uſual decree was made with reſpect to the mortgages, for an account of the principal, intereſt, and coſts.

An Exception was taken by the plaintiffs to the Maſter's Report; that in taxing the coſts of the plaintiffs, relating to their mortgages, he had diſallowed ſo much as were incurred by making the defendants, who had entered into the contracts, parties; whereas he ought to have allowed them: they being neceſſary parties.

Mr. Mansfield for the defendants objected, that there cannot be an Exception for coſts; it muſt be by Petition.

Lord CHANCELLOR—I underſtand the practice to be, that if the decree has directed coſts, and the Maſter has not taxed them, you may except: but if he has proceeded upon the coſts, but has not allowed ſeveral items, which are claimed, there muſt be a Petition.

Mr. Romilly and Mr. Stratford in ſupport of the Exception, ſtated the practice to be, that though there cannot be an Exception for coſts only, yet if the party excepts upon any other ground, he may add an Exception for coſts; as upon a rehearing or appeal upon other grounds you may enter into the queſtion of coſts; though you cannot rehear or appeal for coſts only.

The Exception was allowed; and it was referred back to the Maſter to review his Report, as far as it related to the coſts reſpecting what was due upon the mortgages to the plaintiffs; with a direction not to allow coſts occaſioned by any other demand except as mortgagees.

1801.

July 21. 31.

ALDRIDGE *v.* MESNER.

Upon a bill of interpleader the defendant, who made it neceſſary, was ordered to pay all the coſts; and the plaintiff has a lien for his coſts upon the fund paid into Court.

THE plaintiff filed a bill of interpleader againſt *Meſner* and *Whitchurch*; the former of whom bought a horſe from the latter by auction for ſeventy-nine guineas. The plaintiff was the auctioneer. The horſe was warranted ſound. He was returned as unſound the day after, by the terms of the ſale the purchaſer was to be at liberty to return him, but before the plaintiff had paid over the money. The defendant *Whitchurch* demurred to the bill; and both parties bringing actions for the money againſt the plaintiff, he moved for an injunction. The late Lord Chancellor being of opinion, that the action brought by *Meſner* againſt *Aldridge* would try the merits, made an order upon that motion, that the action of *Meſner* ſhould proceed; that *Whitchurch* ſhould be reſtrained from proceeding in his action; and ſhould undertake the defence of the other action for *Aldridge*. That action ended in a nonſuit. The demurrer was not argued.

Mr. Grimwood for the plaintiff moved, that his coſts may be paid out of the fund, which he had paid into Court, without going on with the cauſe; obſerving, that he was a mere ſtake-holder; and citing *Aldrich* v. *Thompſon* (*a*).

Mr. Stanley and Mr. W. Agar for the defendants inſiſted, that this was not an interpleading bill; and the plaintiff was not a mere ſtake-holder; that he ought to have paid over the money immediately, when the horſe was not returned at the time ſpecified; that he was not entitled to any coſts; and the bill ought to be diſmiſſed.

Lord CHANCELLOR—Under the circumſtances, that have taken place, to all ſubſtantial purpoſes the defendant *Whitchurch* has waived his demurrer. Both the defendants have waived all objection, and decided the cauſe by ſubmitting to that order. Beſides, I am not ready to admit, that this is not an interpleading bill; for I have tried actions more than once; in which it appeared clearly, that the condition to return a horſe by a certain

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(*a*) 2 *Bro. C. C.* 149.

day was inſerted on purpoſe, becauſe the defect would not appear till a day or two after that day. The juſtice of the caſe is, that the plaintiff ſhould have his coſts; and he has a lien for them upon the fund.

July 31.

An order was made on motion that *Meſner* ſhould pay all the coſts. The Lord Chancellor ſaid, he conſidered the bill as in the nature of interpleading bill at leaſt; and upon an interpleader, if there was no fund in Court, coſts would be given againſt the party, who occaſioned it.

P—— *v.* BELL.

July 31.

Order for liberty to let an infant's eſtate, without a reference to the Maſter: the property being ſmall: but not to extend to building leaſes, nor beyond minority.

Mr. *Alexander* moved, that a truſtee ſhould be at liberty to let an infant's eſtate: the rent not exceeding 15*l.* a year.

Lord Chancellor ſaid, the Court had certainly diſpenſed with a reference to the Maſter on account of the ſmallneſs of the property; and made the order; that the truſtee ſhould be at liberty to let, with the approbation of the Receiver: but that this ſhould not extend to building leaſes; nor extend beyond the infant's minority.

LORD TAMWORTH *v.* LORD FERRERS.

May 13. 23.
Aug. 1.

Injunction to reſtrain tenant for life without impeachment of waſte from cutting timber or other trees planted or growing for ſhelter or ornament, and from cutting except in a huſbandlike manner.

Under indentures of ſettlement, dated the 24th and 25th of *May* 1781, Earl *Ferrers* was tenant for life without impeachment of waſte, other than voluntary or permiſſive waſte in reſpect of buildings; remainder to Lord *Tamworth*, his only ſon, for life in the ſame manner; with remainders in ſtrict ſettlement to his firſt and other ſons in tail male, and remainders over.

In this cauſe an injunction was obtained, reſtraining the defendant, his agents, ſervants, and workmen, from felling, or cutting down, or marking, or advertiſing for ſale, or ſelling, or cauſing to be felled, or cut down, or marked, or advertiſed for ſale, or ſold, any of the timber or other trees, or any woods, polls, or ſaplings, not being of a growth fit to be cut down, then ſtanding, growing, or being, upon the eſtates in queſtion in the ſaid cauſe, and particularly from felling, or cauſing to be felled, ſuch parts thereof as had been already marked for ſale and felling, or any part thereof; and alſo from committing any wilful or malicious waſte, ſpoil, or deſtruction, on the ſaid eſtates, either by pulling down, or damaging, or permitting to be pulled down, or damaged, any of the manſion houſes or other buildings thereon, or in any manner howſoever, until anſwer and other order.

By an order, dated the 23d of *May*, upon the anſwer the former order was diſcharged; and it was ordered, that the injunction be diſſolved; and that an injunction be awarded to reſtrain the defendant, his ſervants, workmen, and agents, from committing waſte, ſpoil, or deſtruction, in the manſion and other houſes upon the eſtates in queſtion; and from cutting down any timber or other trees growing upon the eſtate, which are planted or growing there for the protection or ſhelter of the ſeveral manſion houſes belonging to the eſtates, or for the ornament of the ſaid houſes; or, which grow in lines, walks, viſtas, or otherwiſe for the ornament of the ſaid houſes, or of the gardens, parks, or pleaſure grounds, thereunto belonging; and alſo to reſtrain the defendant, his ſervants, *&c.* from cutting down any timber or other trees, except at ſeaſonable times and in a huſbandlike manner; and likewiſe from cutting ſaplings and young trees not fit to be cut as and for the purpoſes of timber, except in the ſpring woods, and from cutting any thing in the ſpring woods but in a huſbandlike manner, until hearing or farther order.

Motions were made on the one ſide to diſſolve the injunction, on the other, for a ſequeſtration againſt the defendant for breach of it. The affidavits ſworn on behalf of the plaintiff ſtated, that the trees were cut in an unhuſbandlike manner, when not of proper growth; trees, which were planted as well for the protection and ſhelter of the manſion-houſe as for the ornament thereof, and improper to be cut, as being a ſhelter, protection and ornament, to the manſion-houſe, gardens, park and pleaſure grounds. The affidavits on behalf of the defendant aſſerted, that the timber was cut in a huſbandlike manner, particularly upon a compariſon with the neighbouring woods; and that the trees near the houſe, which were ſaid to be a ſhelter, were only an irregular hedge-row, and, inſtead of ſhelter, injurious in keeping the mid-day ſun from the gardens.

A compromiſe afterwards taking place, the motion for the ſequeſtration was abandoned; and the bill diſmiſſed by the plaintiff without coſts (*a*).

(*a*) See *The Marquis of Downſhire* v. *Lady Sandys*, *ante*, 107. The orders of injunction in theſe caſes were framed upon the order in *Chamberlayne* v. *Dummer*.

PRIESTLEY *v.* LAMB.

Aug. 1. 5.

Upon a marriage of a ward of the Court under flagrant circumſtances, the clergyman and clerk were ordered to attend: the huſband was committed; and the Lord Chancellor directed the proceedings to be laid before the Attorney General; expreſſing his opinion, that contriving a marriage without a due publication of banns is a conſpiracy at Common Law.

Ann Lamb, entitled to a fortune of between 2,000 *l.* and 3,000 *l.* was placed by her uncles, living in *Lincolnſhire*, at a boarding ſchool at *Camberwell* kept by three ſiſters. In *January* 1801, when ſhe was about the age of ſeventeen, *Timothy Prieſtley*, the brother of the governeſſes, and employed there in the capacity of writing-maſter, being a widower, paid his addreſſes to her; and in *February* they were married. *Ann Lamb* being a ward of the Court, a petition was preſented to the Lord Chancellor, and the following circumſtances appeared upon the affidavits.

The marriage took place at the pariſh church of *St. Andrew's*, *Holborn*, by banns, in the preſence of *Elizabeth Prieſtley*, one of the ſiſters of *Timothy Prieſtley*, and another perſon. *Elizabeth Prieſtley* had quitted the partnerſhip with her ſiſters at *Chriſtmas* 1800: but it did not appear, that ſhe had quitted the houſe. The parties left *Camberwell* on the morning the marriage took place; and it did not appear, whether the lady had actually reſided in *Holborn*. *Timothy Prieſtley* ſtated by his affidavit, that he conſulted with the pariſh clerk of *St. Andrew's*, how he could be married; and the clerk told him, that the marriage, if with the conſent of the friends of the lady, might be by licence: if without their conſent, it muſt be by banns; and he muſt take a lodg-

1801. PRIESTLEY *v.* LAMB.

ing for her in the pariſh: he himſelf having chambers in *Furnival's Inn*. This affidavit was in ſome reſpects contradicted by the clerk. They were afterwards again married at the pariſh church of *Lambeth*; and the clerk of that pariſh by his affidavit ſtated, that it is not cuſtomary to make any inquiry as to the reſidence of parties applying to be married. The two ſiſters, who remained miſtreſſes of the ſchool, denied any knowledge of the fact of the marriage.

The Lord CHANCELLOR immediately committed the huſband; and obſerved, that this was a very flagrant caſe, from the ſituation of the miſtreſſes of the ſchool, *in loco parentis*; and *Thompſon*'s caſe (*a*) being mentioned by Mr. *Pemberton*, his Lordſhip ordered not only *Elizabeth Prieſtley*, but the two miniſters, who celebrated the marriages, and the clerks, to attend.

Aug. 5. The parties attended in Court accordingly.

Lord CHANCELLOR—I cannot conſiſtently with my ideas of juſtice call upon any of the parties now preſent for any explanation. Upon the circumſtances diſcloſed it is juſt to ſay, I hold in ſuch abhorrence the robbery, that has been committed by this man of the fortune of this young lady, that I will not believe upon his affidavit the account he gives of what paſſed between him and the clerk of *St. Andrew's*. If ſhe did go from the ſchool to this reſidence, it muſt have been an evaſive reſidence. It could not have been more than a week. With reſpect to *Elizabeth Prieſtley*, it would not be out of the practice of the Court to commit her for the contempt. As to the other ſiſters, it is a miſerable explanation of their conduct to ſay, only, that they did not know of the fact of the marriage. It will reſt with them to explain farther, or not, whether they knew of the treaty.

By the affidavit of the clerk of the pariſh of *Lambeth* it is diſcloſed, that they conceive in that pariſh, that they do their duty

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(*a*) The marriage in that caſe was by licence: *Thompſon* the huſband having made the neceſſary affidavit for that purpoſe. The wife upon inſpection being evidently under age, Lord *Roſslyn* ordered the clergyman to attend; and ſeverely reprimanded him; and, having immediately committed *Thompſon*, directed the Attorney General to indict him for perjury. He was accordingly indicted; and convicted. *Millet v. Rowſe. Poſt. More v. More*, 2 *Atk.* 157.

By the Canon Law, which is binding on the clergy, it is highly criminal to celebrate marriage without a due publication of banns; which muſt ſuppoſe information as to the reſidence. Penalties by that law and the ſtatute law upon the clergyman.

to the public, and to the individuals, whom they are to marry, never making any inquiry as to the reſidence of the parties. In the Canon Law, which binds the clergy of this country (*a*), from 1328 to 1603 it is laid down, that it is highly criminal to celebrate marriage without a due publication of banns; which muſt be interpreted a publication of banns by perſons having to the beſt of their power informed themſelves, that they publiſh banns between perſons reſident in the pariſh; and very heavy penalties are by that law inflicted upon clergymen celebrating marriage without licence or a due publication of banns. It does not reſt there; for by the Statute Law it would be very difficult for the clergyman to protect himſelf againſt expreſs penalties by more than one act. Then the marriage act (*b*) expreſsly provides (*c*), that no parſon, vicar, miniſter, or curate, ſhall be obliged to publiſh banns between any perſons, unleſs they ſhall ſeven days at leaſt before the time required for the firſt publication, deliver to ſuch parſon, &c. a notice in writing of their true chriſtian and ſurnames, and of the houſe or houſes of their reſpective abodes, within ſuch pariſh, &c. and of the time, during which they have dwelt in ſuch houſe or houſes reſpectively. A ſubſequent clauſe (*d*) makes it felony in a clergyman to celebrate marriage without licence or publication of banns. I do not mean to intimate, that a clergyman believing, there was a reſidence, would be guilty within that clauſe. But upon the principles of the Common Law, as well as the Statute Law, laying penalties upon marriage without licence or a due publication of banns, though ſuch a fact ſhould not be within the meaning of that clauſe, it has the character of an offence within the law of this country. What other ſenſe can be given to the 10th ſection of the act; which looking at the perſon ruined, as this girl is, enacts, that, after there has been a marriage *de facto* with publication of banns, no evidence ſhall be given to diſprove the fact of reſidence in any ſuit, in which the validity of the marriage comes in queſtion. But for all other purpoſes it may be the ſubject of inquiry; and the law of the country would reach it by a Criminal Information. It is a more difficult queſtion, whether it can be conſidered a conſpiracy. From what I have ſeen in this Court, alluding to the caſes,

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(*a*) 2 *Atk.* 157. The canons do not bind the laity, unleſs confirmed by Parliament. See *Middleton Crofts*, 2 *Atk.* 650. 2 *Str.* 1056. where the ſubject is fully diſcuſſed.

(*b*) 26 *Geo.* 2. *c.* 33.

(*c*) Sect. 2.

(*d*) Sect. 8.

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caſes, in which Lord *Thurlow* and Lord *Roſslyn* ordered the attendance of the clergymen, I know, that this ſubject is carried on with a negligence and careleſſneſs, that draws in gentlemen of good intentions; and I feel, that it may be very difficult in this great town, with all poſſible diligence to execute this duty as effectually as the law ſeems to require, that they ſhould execute it: but, where a caſe has occurred, in which it is clear, that if any one of the parties had done what the law required from all of them, this marriage could not have taken place, I muſt ſay, it amounted to a criminality, which I hope will not occur in future. This is ſo baſe and wicked a tranſaction, that treating it merely as a contempt will not ſatisfy the ends of juſtice. Following the caſe, in which the marriage was had upon a licence unduly obtained, I will have the point examined for the ſake of the public, whether obtaining a marriage without a due publication of banns is not an offence at Common Law.

Without aſking an explanation of any of the parties for obvious reaſons, I ſhall order the proceedings to be laid before the Attorney-General, to ſift the tranſaction, and to ſee, whether any of the parties cannot be convicted of a conſpiracy at Common Law. As to the fortune, it muſt be referred to the Maſter to receive a propoſal; and upon the circumſtances the Maſter will, I am perſuaded, take care, that neither *Prieſtley* nor any one belonging to him ſhall ever touch a ſhilling of that property, real or perſonal.

Aug. 12.

Prieſtley afterwards preſented a petition to be diſcharged out of cuſtody on executing a conveyance according to a propoſal approved by the Maſter; but the Lord Chancellor would not make the order; obſerving, that, what remained was with the Attorney-General: his Lordſhip expreſſing his opinion, that, excluſive of the contempt, contriving a marriage by an undue publication of banns is a conſpiracy; for which he may, and ought to be, indicted.

The two ſiſters, the miſtreſſes of the ſchool, made an affidavit, of their total want of knowledge or ſuſpicion of the treaty;

upon which the Lord Chancellor obſerved, it was with regard to them reduced to a caſe of negligence, different from poſitive connivance.

REEVES *v.* BRYMER.

Aug. 5.

Maintenance allowed for the time paſt.

A PETITION was preſented for an allowance for the maintenance of the infant daughter of the petitioner according to the Maſter's Report; and claiming two ſums, which the petitioner had paid and made himſelf liable to for her maintenance previouſly to the Report.

The Lord CHANCELLOR obſerved, that the old practice was, that if the father had by any means maintained his children, the Court would not reimburſe him.

Mr. Hart in ſupport of the petition, and Mr. Richards (*Amicus Curiæ*) ſaid, the practice had been altered very ſoon after Lord *Roſslyn* came into the Court; and the late Maſter of the Rolls had made ſeveral orders of this ſort; which had been found neceſſary.

The Lord CHANCELLOR expreſſed his approbation of the practice, as altered; and made the order.

Ex parte THE EARL OF UXBRIDGE.

Aug. 5, 6.

Order, without a cauſe in Court, upon the general juriſdiction over a ſolicitor, that he ſhall deliver his bill; for the purpoſe of getting from him title deeds depoſited with him for ſuffering Recoveries, &c.

THE object of this petition, preſented without any cauſe in Court, was to get title deeds out of the hands of a Solicitor, with whom they had been depoſited for the purpoſe of ſuffering Recoveries in the Court of Great Seſſions in *Wales* and drawing deeds, upon paying him his bill; and the petition prayed, that he might deliver his bill; but did not deſire to reſtrain him from proceeding at law.

Mr. Hart in ſupport of the petition—This petition is preſented upon the general juriſdiction of the Court over Solicitors. In a caſe before Lord *Roſslyn* a Solicitor had merely prepared an affidavit to found a docket for a Commiſſion of bankruptcy; and the buſineſs ended there: the Commiſſion never having been taken out. The Solicitor brought an action againſt his client; and Lord *Roſslyn* upon the general controul of the Court over a Solicitor directed the bill to be taxed; and reſtrained him from proceeding at law. That is not deſired by this petition; though the petitioner offers to pay the bill. No other courſe can be adopted but this or a bill in equity; as the deeds cannot be deſcribed ſufficiently for an action of trover.

The Solicitor did not appear.

The Lord CHANCELLOR ſaid, there was no doubt, the Court exerciſed this juriſdiction long before the ſtatute (*a*); which did little more than introduce the regulations, under which the juriſdiction ſhould be exerciſed; and, as the Solicitor did not appear, granted the order: but afterwards his Lordſhip directed it to be ſtopped; expreſſing ſome doubt upon it.

The next day the Lord CHANCELLOR ſaid, he had looked into the caſes; and was ſatisfied by a caſe in the *Term Reports* (*b*), and another in *Strange* and *Modern* (*c*), that the application might be made.

The order was made.

(*a*) 2 *Geo.* 2. *c.* 23. (*b*) *Hughes* v. *Mayre*, 3 *Term Rep. B. R.* 275.
(*c*) *Strong* v. *Howe*, 1 *Str.* 621. 8 *Mod.* 339.

Ex parte FLETCHER.

Aug. 6.

The Court will not appoint a Maſter in Chancery to an office, in reſpect of which he will be liable to account; as, committee of a lunatic's eſtate. The Court refuſed to appoint a perſon committee of a lunatic, upon the circumſtances; particularly, that he had agreed to give part of the profits to another.

THE prayer of this petition was, that *Fletcher* may be appointed committee of the perſon of a lunatic; and that another gentleman, who was one of the Maſter's of the Court, may be appointed committee of the eſtate. Objections were taken to both appointments: as to the latter, on grounds of public policy, with the additional circumſtance, that the appointment of any one of the profeſſion of the law would have a tendency to irritate the lunatic. As to *Fletcher*, it was ſaid, he had been removed from the ſituation of committee by Lord *Thurlow* principally on the ground, that he had agreed to give three-fourths of the ſavings of the profits as committee to another perſon.

Mr. Romilly and Mr. Hart in ſupport of the petition. Mr. Alexander and Mr. Owen for the next of kin.

Lord CHANCELLOR—With reſpect to the appointment of a Maſter of this Court as a committee, I am perfectly ſatisfied, that ought not to be. From a letter written by the lunatic it is clear, he is irritated by a prejudice againſt lawyers in general; and under the influence of that prejudice he has ſelected individuals of the profeſſion; of whom his abhorrence is as extreme, as it is unfounded. But, independent of that conſideration, it is a ſingular propoſition, that a Maſter in Chancery ſhould be appointed a committee. If ſo, there is no reaſon, why a Maſter ſhould not be appointed a receiver; and if one Maſter may be appointed a committee or receiver, every other Maſter may be a committee or receiver of ſome other lunatic's eſtate. They would have to paſs each other's accounts. Upon the fair influence, that the character of one Maſter in matters of account would have upon the mind and judgment of another Maſter, the concluſion muſt be, that the appointment of them as receivers and committees, a ſituation, in which third perſons are to enter into conflict with them, never could obtain a ſatisfactory adminiſtration of juſtice. Though private perſons may put them in the character of executors, the property of ſuitors is not by the judgment of this Court to be put into the hands of its officers. That principle the Court has been pretty ſtrongly taught to act upon. It is a ſatisfaction, that it has occurred to me to ſay, I cannot appoint a Maſter to be a committee, in the inſtance of a gentleman, than whom there is no man I would rather truſt with the management of my own property.

As to the committee of the perſon, this under the circumſtances is a ſtrong application. I approve the diſtinction, that the office of committee is given for the ſake, not of the committee, but of the lunatic; and the allowance is to be given for the purpoſe of attaching him to the lunatic. A circumſtance to be attended to upon this queſtion is, that you find this perſon engaged in a diſtinct bargain, that another perſon, not in the character of committee, ſhall have three fourths of the ſavings of the profit ariſing from the office of committee. Upon all the circumſtances the petitioner ought not to be appointed.

Aug. 6.

Ex parte TABBERT.

Agreement by the committee of a lunatic, that coal under the lunatic's eſtate ſhould be worked by the owner of the adjoining land, eſtabliſhed under the circumſtances.

UPON a petition in lunacy it appeared, that the lunatic was tenant for life without impeachment of waſte; remainder to his firſt and other ſons in tail; with various remainders over. The lunatic was unmarried. Coal was found upon the eſtate, but in too ſmall a quantity to juſtify ſinking a ſhaft: but it was capable of being worked by means of a ſhaft in the adjoining land. Part of the eſtate of the lunatic was in mortgage; and the mortgagee was in poſſeſſion; which reduced the income of the lunatic conſiderably. There were alſo other debts without any fund to anſwer them. Under theſe circumſtances the committee agreed with the owner of the adjoining land to work the coal; which the Maſter reported to be for the benefit of the lunatic. The Maſter was attended by the next of kin; who were ſerved with notice by the direction of the late Lord Chancellor.

The prayer of the petition was, that the Report may be confirmed.

Lord

1801.

Ex parte TARBERT.

Lord CHANCELLOR—This is under ſingular circumſtances. The next of kin have an intereſt, that the coal ſhall be worked. The heir at law has no intereſt: there being various remainders over. Under theſe circumſtances, I think, it may be done by the committee. It is like cutting timber.

Ex parte LEICESTER.

Aug. 8.

THE petition ſtated, that upon application at the Bankrupt Office upon the 10th of *July* by the agent of an attorney at *Liverpool* for the purpoſe of ſtriking a docket againſt *Marſden* and *Tonge*, of *Liverpool*, it was found, that ſeven dockets were ſtruck, and ſome Commiſſions iſſued, againſt them under various firms; but none of them interfering with his application, except one docket, ſtruck on the 25th of *June* preceding at the inſtance of *Layton*, a merchant in *London*. No Commiſſion had iſſued upon that docket: but the ſolicitor was informed, that the ſolicitor, who beſpoke the Commiſſion, muſt be ſent to, and his anſwer received, before the other documents could be received. The next day he was informed, that the former commiſſion would be ſealed; in conſequence of which he withdrew his application. On *Saturday*, the 25th of *July*, the time for opening the former Commiſſion expired; and it became ſuperſedeable under the order (*a*) of the late Lord Chancellor, dated the 26th of *June* 1793; and the petitioner became entitled to a ſuperſedeas and a new Commiſſion. A petition was preſented; and upon the 27th of *July* an order was made by the Lord Chancellor, that the former Commiſſion ſhould be ſuperſeded; and 10*l.* 18*s.* 2*d.* was paid for the ſuperſedeas and for a new Commiſſion; which was directed to be ſealed at the next ſeal. Upon the 29th the former commiſſion was opened; and *Marſden* and *Tonge* were declared bankrupt. Notice of the adjudication was given at the Bankrupt Office; and notice to the petitioner's agent, that his application muſt be conſidered void.

A commiſſion of bankruptcy ſuperſedeable under Lord *Loughborough's* order, dated the 26th of *June* 1793, is not actually ſuperſeded till the writ of ſuperſedeas iſſues; and therefore having been opened, and the bankruptcy adjudged, after the order made for the ſuperſedeas, but before the writ ſealed, notice of the application having been according to the practice in the office ſent to the ſolicitor, the commiſſion was ſupported.

Qu. Whether the order of Lord *Apſley*, dated the 12th of *February* 1774, that a docket ſtruck, and no commiſſion iſſued thereon, ſhall in no caſe prevent a commiſſion by another creditor upon an application not made in leſs than four days, can be ſtrictly acted upon: the eſtabliſhed practice in the office being at variance with it; and there being danger of fraud.

(*a*) 2 *Cooke's* Bank. Law, 372.

1801.

Ex parte Leicester.

The prayer of the petition was, that the ſuperſedeas may be ſealed, the proceedings under the former Commiſſion ſtaid; and that a new Commiſſion may iſſue: or if the Lord Chancellor ſhould be of opinion, that the former Commiſſion ought not to be ſuperſeded, then, that the choice of aſſignees may be adjourned; in order to give the country creditors an opportunity of voting.

It was ſtated by the affidavits, that the Commiſſion was ordered by a creditor in *London* without any knowledge, that an act of bankruptcy had been committed; and he afterwards wrote to *Lancaſhire* for the purpoſe of procuring witneſſes to prove an act of bankruptcy. Some delay was occaſioned by endeavours to procure a deed of truſt; in which object the Solicitor at *Liverpool*, who applied for the ſecond Commiſſion, joined.

Mr. Mansfield and Mr. Pemberton in ſupport of the petition—This Commiſſion is irregular, firſt, upon the order of Lord *Apſley* (*a*): no Commiſſion having iſſued on the docket ſtruck at the time of the application by this petitioner. Alſo under Lord *Loughborough*'s order the new Commiſſion ought to have been immediately ſealed, without any notice to the Solicitor, who ſtruck the firſt docket. The order for the ſuperſedeas, ſigned by the Lord Chancellor, put an end to the Commiſſion; though the ſeal was not put to the writ. If this practice prevails, it will counteract Lord *Loughborough*'s order; for ſtill the Attorney, who ſtruck the firſt docket, has the preference. A caſe in the bankruptcy of *Jenkins* and *Reddily* will probably be cited in ſupport of this practice; a caſe, in which Lord *Roſslyn* directed, that the Commiſſion, that had iſſued, ſhould be proſecuted: but his Lordſhip had conſiderable doubt upon it; and ſaid, he ſhould prevent that practice in future.

Next, upon the particular circumſtances, diſcloſed by the affidavits, this practice of ſtriking a docket immediately, (and there are ſeven in this inſtance) without any evidence of an act of bankruptcy, is very improper (*b*).

(*a*) 12th *February* 1774. 2 *Cooke*'s Bank. Law, 369. (See page 371.)

(*b*) The Lord Chancellor ſaid, he had often been ſurpriſed at this mode of ſwearing to an act of bankruptcy firſt, and inquiring afterwards, whether there was an act of bankruptcy.

Mr. Piggott and Mr. Cooke in ſupport of the Commiſſion—The practice is perfectly ſettled; and your Lordſhip will not overſet it in a particular inſtance. Upon the ground now taken there never would be occaſion to take out the writ of Superſedeas: but that is the authority, which ſuperſedes the Commiſſion: the order is not the operative act. There are ſeveral other inſtances, beſides that, which has been mentioned. In the bankruptcy of *Higgs* (*a*), in the bankruptcy of *Frith* (*b*), and in the bankruptcy of *Kirkpatrick* (*c*), all ſubſequent to the laſt order, this practice prevailed; and it was held, that the order is not infringed, if the Commiſſion is in proceſs; though, from unavoidable circumſtances, as in ſome caſes, the abſence of Commiſſioners, *&c.* the adjudication cannot be obtained within the fourteen days. The object of the order was to prevent Commiſſions being ſealed, that are never intended to be opened, in order to prevent others being taken out. But that is very different from this caſe. This Commiſſion was intended to be opened, as ſoon as it could be. In *Ex parte H*—— (*d*) the Commiſſion was ſealed upon the 19th of *November*. A meeting of creditors was called, for the purpoſe of an arrangement; and it was agreed to endeavour to get a deed of truſt. That delayed the opening of the Commiſſion until the 8th of *Auguſt* following; when the Commiſſion was opened at *Exeter*: but that could not be known in *London*; and a Superſedeas was obtained. Upon a petition to annul that Superſedeas, Lord *Thurlow* did annul it; and ordered a Procedendo upon the firſt Commiſſion.

Upon the particular circumſtances of this caſe, here alſo there was a fruitleſs attempt to get a deed of truſt; and this country Solicitor was preſent upon all occaſions. There was a notorious act of bankruptcy: *Marſden* and *Tonge* having notoriouſly abſconded at the time the docket was ſtruck; their creditors being thereby delayed. That was ground enough for ſtriking a docket: but it was neceſſary to find out perſons, who could ſwear to the fact, and to ſend to *Lancaſhire* for witneſſes. When the Solicitor wrote to *Lancaſhire*, the anſwer was, that they could obtain no information: the ſervants were all tutored. At laſt the clerk was found in *London*; who proved the act of bankruptcy upon the 29th of *July*.

(*a*) In 1797. (*b*) In 1800. (*c*) *Dec.* 1800. (*d*) Before Lord *Thurlow* 1791.

The rule of Courts of Law, that all affidavits ſhall be filed a certain time before the diſcuſſion: the practice of this Court otherwiſe; and preferred notwithſtanding the inconvenience.

Lord CHANCELLOR—I have often thought of a rule, that all affidavits ſhould be filed in a certain time before the diſcuſſion, according to the rule of the Courts of Law: but in oppoſition to that there has been the uniform practice of this Court; where the miſchief has been daily felt, and complained of, without an attempt to remedy it; and by my own experience at Common Law I am convinced, that though that rule is very convenient for the diſpatch of buſineſs, he, who is heard laſt, frequently introduces a ſtate of tranſactions, which governs the judgment; and which, if explained, would ſatisfy the Court, that it is made ancillary to the greateſt injuſtice. We muſt therefore, I think, ſubmit to the inconvenience of the practice of this Court.

With reſpect to the firſt ground, upon which this petition is preſented, the effect of the order for a Superſedeas, I have no doubt, that an order for a ſuperſedeas is not a Superſedeas. It is a declaration of the Court, that it is fit under the circumſtances, that the writ of Superſedeas ſhould iſſue. Many circumſtances may ariſe, between the date of the order and the ſealing of the writ, that would prevail upon the Court to recall the order; and there might be many caſes, in which the Court would think, the writ improvidently iſſued; and would ſuperſede it. But with regard to the order of 1793, ſuppoſing, there was no practice upon it, it ſays only, that the Commiſſion ſhall be ſuperſedeable: but it is not ſuperſeded, till ſome ſtep is taken to produce that effect. The perſon applying for the order may calculate, within what time he can get the writ. By a regulation, now founded upon the expreſs approbation of the Legiſlature, if he chooſes to have the writ privately ſealed, there is a larger fee; and he chooſes for himſelf, whether he will have it more or leſs ſpeedily. He knows, that under the order the Commiſſion being only ſuperſedeable ſtill remains an operative proceſs, till he does a farther act. If by the effect of the order it remains a proceſs, upon which a proceeding can be had, and proceedings are had, the ſame as would have been, if the writ iſſued in a later ſtage, where is the inconvenience in letting the former Commiſſion go on? There may be many caſes, in which it would be groſs injuſtice to conſtrue the order otherwiſe, as if the evidence, upon which the Solicitor taking out the Commiſſion thought he was to proceed, was fraudulently kept back, until an application could be made for a Superſedeas, with a view to have the gain of the Commiſſion, and to cover the frauds of the bankrupt. If therefore the Commiſſion has got to that extent of efficacy, before it is actually ſuperſeded, the progreſs to which it was the object of the order of 1793 to ſecure, it is not unwholeſome to ſay, that order has been rightly conſtrued according to the practice, that has obtained. At all events, if I thought the conſtruction of the order wrong, I ſhould not alter the practice in this inſtance; for it muſt always be a rule to uſe the information gained in any particular caſe for the purpoſe of regulating the practice in future, but not to alter it in that inſtance.

As to the other point, upon Lord *Apſley*'s order, it is more difficult to reconcile that with the practice. The words are very ſtrong; that a docket ſtruck and no Commiſſion iſſued thereon ſhall in no caſe prevent the iſſuing a Commiſſion by another creditor, ſo as the application be not made in leſs than four days after the docket ſtruck. But that order was made in 1774; upon which a practice has obtained, contrary, I admit, to the very terms of the order. As to this particular caſe, if the Solicitor had not ſubmitted to the practice of ſending to the other party, I ſhould have been in a ſituation, in which I have found myſelf in a Court of Law: a practice having prevailed for a ſeries of years contrary to the terms of an order of the Court, and ſometimes contrary to an Act of Parliament, it is more conſiſtent to ſuppoſe, ſome ground appeared to former judges, upon which it might be rendered conſiſtent with the practice; and therefore, that it would be better to correct it in future, not in that particular inſtance. Upon the queſtion, whether that order is to be altered, or to be acted upon according to its terms, which are at variance with the practice, I am not now prepared to deliver a deciſive opinion; for this practice having been ever ſince permitted to grow up as expoſitory of the order, if my opinion was different from what it is as to the policy of the order according to its terms, I muſt collect, that there is in that practice teſtimony given, that according to the terms it would be an inconvenient order. According to the beſt of my judgment at preſent that order, if acted upon with the ſtrictneſs its terms would warrant, would open a door to fraudulent practices in bankruptcy wider

1801.

Ex parte LEICESTER.

than what now exiſts to ſuch an extent that nothing but the efforts of the Legiſlature can cloſe it.

Upon the whole there is no ground for granting this application farther than for the purpoſe of letting the country creditors vote in the choice of aſſignees (*a*).

(*a*) See the next caſe.

Aug. 11, 12.

Ex parte LAYTON.
Ex parte HARDWICKE.

An order for a Superſedeas has no effect, till the writ iſſues.

A joint Commiſſion againſt two partners in *England*, another partner reſiding abroad, ſuperſeded.

Where two commiſſions are taken out againſt the ſame party, the Court will execute a diſcretion, controlling the ſtrict right; and ſupport that, which is moſt convenient; if the objections to it can be removed by ſuperſeding the other.

Abuſe of a Commiſſion by delaying the execution of it with a view to another arrangement.

THE petition of *Layton* ſtated, that a docket was ſtruck by the petitioner upon the 25th of *June* againſt *William Marſden* and *Chriſtopher Tonge*, of *Liverpool*, in the County of *Lancaſter*, merchants, dealers, chapmen, and copartners, carrying on trade under the firm of *William Marſden* and Company. Upon the 29th of *July* they were found and declared bankrupts under that Commiſſion. The debt due to the petitioner was 2,000*l.* Another Commiſſion was iſſued againſt *William Marſden* and *Chriſtopher Tonge* of *Liverpool*, in the county of *Lancaſter*, deſcribed as partners with *John Anthony Fraſche*, of the city of *Leghorn* in *Tuſcany*, and *Thomas Martorelli*, of the kingdom of *Naples*, merchants, partners, dealers, and chapmen, trading in *England* under the firm *William Marſden* and Company. The docket, upon which that Commiſſion iſſued, was ſtruck upon the 29th of *June* upon the petition of *Hardwicke* and *Cavendiſh* of *Mancheſter*.

The petition farther ſtating, that the latter Commiſſion is unneceſſary, and cannot be ſupported, not only on account of the prior Commiſſion, but alſo as being a Commiſſion againſt two of four partners, prayed, that the latter Commiſſion may be ſuperſeded.

The petition of *Hardwicke* and *Cavendiſh* ſtated, that the Commiſſion taken out by them was ſealed upon the 1ſt of *July*, the firſt general ſeal after the docket ſtruck; and was received at *Man*-

cheſter in the 4th. The petitioners thought it their duty out of reſpect to the other creditors to call a meeting; eſpecially as three-fourths in number and ſix-eighths in value of the creditors were at *Mancheſter*; and on account of a negotiation for an arrangement upon another plan the Commiſſion was not opened until the 18th; and then the Commiſſioners wiſhing for farther proof of the act of bankruptcy by *Tonge* adjourned to the 25th; when they were declared bankrupts. Upon the 28th notice of the adjudication of the bankruptcy appeared in the Gazette.

This petition then ſtated, that *Layton*'s Commiſſion, ſealed on the 11th of *July*, was upon the 27th ordered to be ſuperſeded on the application of *Leiceſter* (*a*); that upon the 29th that Commiſſion was opened; and they were found bankrupt; ſuggeſting, that that Commiſſion was virtually and effectually ſuperſeded by that order. The petition farther ſtated, that the buſineſs had been hitherto carried on at *Mancheſter* under the firm of *Marſden* and *Fraſche*, and at *Liverpool* under the firm of *Marſden* and Company. At *Mancheſter* the creditors were in number 103, and to the value of 66,000 *l.*: at *Liverpool* 65, in value 9,000 *l.*; and in other places 18, in value 16,000 *l.* The prayer of this petition was, that the other Commiſſion may be ſuperſeded.

In ſupport of *Layton*'s Commiſſion the affidavit of a clerk to *Marſden* and *Fraſche* ſtated, that they carried on buſineſs as merchants at *Liverpool* under the firm of *Marſden* and Company. That partnerſhip expired on the 1ſt of *February* laſt; and *Marſden* took *Tonge* in; and from that time the buſineſs was carried on at *Liverpool* and *Mancheſter* under the firm of *Marſden* and Company; and the deponent believes, there was no other partner; and that *Martorelli* was only a clerk.

The affidavits in ſupport of the other petition ſtated, that all the four were partners. *Francis Hardwicke* ſwore, that *Marſden* informed him, a new partnerſhip was about to take place between him, *Tonge*, *Fraſche*, and *Martorelli*; and that part of the goods were looked out by *Martorelli*; and the deponent underſtood him to be a principal. *William Hardwicke* ſwore, that in *April* or *May Marſden*, in order that a conſignment of goods might

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(*a*) *Ex parte Leiceſter*, the preceding caſe.

be made, gave the firm thus, "*Fraſche, Martorelli* and Company "at *Naples*."

The Solicitor General, Mr. Piggott, and Mr. Cooke in ſupport of Layton's Commiſſion—The caſe of *Marlar* and *Pell* (*a*), and many others have determined, that a Commiſſion againſt two of four partners cannot be ſupported. That principle is recogniſed in *Streatfield* v. *Halliday* (*b*). The point has never been ruled in the caſe of a partner reſident abroad: but the principle is, that there is no joint debt from *Marſden* and *Tonge*; for it is the joint debt of the four. Two of them being out of the kingdom, amounts only to this; that two of them have not committed an act of bankruptcy. There can be no diſtinction in principle from that circumſtance. It would be the ſame, if they lived at *Liverpool*. They ought therefore to have had two ſeparate Commiſſions. This is often the caſe of great banking houſes. In the caſe of *Lane*, *Frazer*, and *Boylſton*, no Commiſſion could be taken out againſt the laſt, till he had committed an act of bankruptcy by lying two months in priſon. In *Ex parte Henderſon* (*c*) it was decided, that one of the partners being an infant, a joint Commiſſion againſt the others could not be ſupported. It is a very ſerious queſtion, which the petitioner has a right to have tried, whether perſons dealing with the world as partners can defeat their creditors by ſetting up a ſleeping partner. The affidavits ſtate, that *Martorelli* was in this country, acting in the buſineſs, chooſing the goods: therefore the ground from his being abroad fails: the fact being falſe. A plea in abatement would hold at law; where the courſe is to outlaw the perſon out of the juriſdiction, and then proceed againſt the other.

Another ground, upon which the ſecond Commiſſion is irregular, is, that the docket was ſtruck too ſoon: the four days not being complete under Lord *Apſley*'s order (*d*). It ought not to have been ſtruck before the 30th of *June*. It would not have been received at the Office, but that from the difference of the deſcription it was thought, they were different perſons; and the conſequence of that is the party, who took out the other Com-

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(*a*) *Allan* v. *Hartley*, *Mich* 25 *Geo.* 3. 1 *Cooke*'s Bank. Law, 5.

(*b*) 3 *Term Rep. B. R.* 779. (*c*) *Ante*, vol. 4. 163.

(*d*) 12th *February* 1774. 2 *Cooke*'s Bank. Law, 369. See the preceding caſe.

miſſion,

Ex parte Layton. Ex parte Hardwicke.

miſſion, had not the notice, to which under the practice of the Office upon Lord *Apſley's* order he was entitled.

Mr. Richards, Mr. Romilly, and Mr. Wetherell, in ſupport of Hardwicke's petition—In fact the Commiſſion taken out by *Hardwicke* was firſt uſed; and they never took any ſtep in the other, till it appeared in the *Gazette*, that this had been executed. Almoſt all the property and creditors are at *Mancheſter* and *Liverpool.* There is infinite inconvenience in lying by ſo long after the docket ſtruck. If theſe four perſons are partners, their Commiſſion is equally open to objection, being againſt two only; which the other diſcloſes. The principle as to partners living here muſt be admitted: but it never has been decided, that, becauſe there are partners living abroad, a Commiſſion cannot be ſupported againſt the partners living here. Upon principle ſuch a deciſion would be very inconvenient; and ought, if poſſible, to be avoided. There is no inſtance of a plea in abatement at law upon this point. *Darwent* v. *Walton* (*a*). Every thing can be done under the Commiſſion, that could be done under a Commiſſion againſt all the partners. The deſcription of theſe perſons as partners is mere ſurpluſage; and can have no effect. In *Ex parte Law* a Commiſſion had iſſued againſt *Smith*, deſcribing him as partner with *Clayton*. Another Commiſſion iſſued againſt *Smith* as trading alone. An attempt was made to ſuperſede the firſt; and Lord *Thurlow* ſaid, the deſcription of him as partner with another has no meaning: but the practice prevailed before his time; that in truth it was only a ſeparate Commiſſion: that deſcription not having any effect to made it a joint Commiſſion.

Lord Chancellor—The general orders in bankruptcy muſt be applied with regard to caſes, in which from the difficulties, that may occur, fourteen days and ſometimes more may be neceſſary for opening a Commiſſion: but I am not at preſent diſpoſed to ſay, that in all caſes the Solicitor taking out the Commiſſion has a right to hold the other creditors at arm's length; not propoſing an arrangement, while the parties ſtand merely in the relation of debtor and creditor; but taking out a Commiſſion, and holding it over the bankrupt; ſealing up his mouth; and,

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(*a*) 2 *Atk.* 510.

inſtead of executing the Commiſſion with all due diligence, as directed by the Great Seal, making it the means of bartering for ſome other arrangement. Such a uſe of a Commiſſion, though it may be expedient in ſome caſes, will be groſsly enormous in many; and is an abuſe of the authority of the Great Seal; upon which I ſhould be diſpoſed to ſay, a Commiſſion ſo conducted ſhould not be executed. The conſequence is, that under a notion of convenience the effect of the bankrupt laws is deſtroyed.

Whether, and under what circumſtances, a trader can plead in abatement a partner abroad, *Qu.*

It did not occur in this bankruptcy, that a very grave queſtion might ariſe upon the point, whether perſons living here, and trading openly as partners, could plead in abatement, that there was a partner abroad. There may be circumſtances, upon which a great deal of argument would be neceſſary to convince me, that ſuch a plea would do. Suppoſe, they had carried on buſineſs only as *Marſden* and *Tonge*, and the creditor did not know, that there was a dormant partner: he would have his option; for he is not bound to conſider the dormant partner as his debtor. But this buſineſs was carried on under the firm, not of *Marſden* and *Tonge*, but of *Marſden* and Company; and if perſons will deal without inquiring, of whom the firm conſiſts, it does not follow neceſſarily, that in that caſe a plea in abatement would not do. In Lord Chief Juſtice *Willes*'s Report of *Criſpe* v. *Perritt* (a) he ſtates, that it was very familiar at that day, notwithſtanding what appears in *Atkyns*, for joint creditors to prove under a ſeparate Commiſſion. But the diſcuſſion of this queſtion is not very uſeful in bankruptcy; for if in fact the effects were thoſe of the three, the creditors of the three might inſiſt upon a diſtribution among them.

This is therefore not to be embarraſſed with the queſtion upon the plea in abatement; with reſpect to which the queſtion is, not upon the matter in the Declaration, taken with the plea, but upon the Declaration itſelf; how it would be, if the fact, that there were partners abroad, appeared upon the Declaration; and I remember, when that notion of being bound to plead in abatement was new in *Weſtminſter Hall*.

(a) *Willes*'s Rep. by *Durnford*, 467. 1 *Atk* 133.

The point upon the Superſedeas I have already determined (*a*); and I am ſtill of the ſame opinion. The next queſtion is, independent of the effect of that order, does the proceeding in this Commiſſion upon the 25th of *July* under the circumſtances preclude what was done under the former Commiſſion? Whatever may be the inconvenience upon the form, I ſhould be obliged to ſay, it does not, upon the principle I ſtated the other day; that the practice cannot be reformed in the preſent inſtance; though it may be fit to reform it in future. The practice of the Office is, that if a docket is ſtruck under one deſcription, and another application comes with another deſcription, the latter is received; as, though it is againſt the ſame perſon, that cannot be known: otherwiſe notice would be ſent to the other party, according to the practice in the Office. Theſe jarring proceedings ariſe out of the accidental circumſtance of the different deſcription in the ſecond docket; which leading to this embarraſſment muſt therefore prejudice him, who has given a different deſcription, though by accident. If therefore this caſe is to be determined upon the queſtion of form, ſuppoſing both Commiſſions proper as to the trading, &c., that queſtion muſt be decided with the firſt Commiſſion. But if that is ſo, notwithſtanding a clear right to take out a Commiſſion, yet, if there are two Commiſſions, and the Court ſees, that by ſuperſeding one, the other may be made good, and will anſwer the purpoſe of convenience to the creditors and the bankrupt himſelf, the Court will ſuperſede the one, if the objections to the other would thereby be removed. There is therefore no doubt of the authority of the Court to overturn the *London* Commiſſion, if it ſhould think fit to do ſo. But I do not ſee how the *Lancaſhire* Commiſſion could ſtand, if I ſhould overturn the other. That is founded upon the debt of perſons, who have erroneouſly repreſented themſelves to be creditors of the four (*b*). If he is creditor of the three, the ſame objection ariſes; and it is impoſſible to ſupport his Commiſſion: at leaſt it is ſo doubtful, that if I can ſupport the other, I would not put it in peril by ſuperſeding that and leaving this. It is very material, if the perſon reſident abroad has been in *England*. But it is very difficult to

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(*a*) *Ex parte Leiceſter*, the preceding caſe.

(*b*) The fact proved to be, that *Fraſche* was not a partner: but it was not diſcovered till the hearing.

1801.

Ex parte Layton. Ex parte Hardwicke.

Where one partner is an infant, or lunatic, there cannot be a joint commiſſion of bankruptcy againſt the others: ſeparate commiſſions muſt be taken out.

diſcriminate this from the caſe of partners, where one is an infant or a lunatic; in which caſes it is clear, you cannot have a joint Commiſſion againſt the others: but ſeparate Commiſſions muſt be taken out. I do not ſee the convenience of ſaying, the affairs of the three ſhall be arranged under a joint Commiſſion againſt two rather than under ſeparate Commiſſions: the proceſs under ſuch a joint Commiſſion no more attaching upon the effects of the three than under a ſeparate Commiſſion. But there is a fundamental objection in the petitioning creditor's debt; for the reaſoning in *Criſpe* v. *Perritt*, as reported by Lord Chief Juſtice *Willes*, went upon this; that a Commiſſion of bankruptcy is an action and execution in the firſt inſtance: but it muſt be according to the nature of the debt; and the execution is the ſeveral fruit of the action joint.

Then upon the queſtion, whether this can be reformed, I feel no inclination for that: nor would it be deſired, if the creditors of the three are to run away with all the effects. In that caſe it would not be worth while to aſk the matter of this petition. If under theſe circumſtances I cannot ſupport the *Lancaſhire* Commiſſion, I am relieved from the conſideration of the comparative number of creditors in one part of the country and another; and therefore do not ſtate, what weight I ſhould give to thoſe circumſtances, farther than, as a general propoſition, that they do not make much impreſſion on my mind. Upon the affidavits I am not ſatisfied, that there ever was ſuch a partnerſhip as that of the two alone. It was preſſed, that *Layton* has a right to try, whether the two are not to be conſidered with reſpect to his debt as the only partners. If I was ſatisfied, that in fact the effects belong to the three, I am not ſure, that I ſhould permit a Commiſſion to ſtand, merely to determine that point of law, which would not attach upon the adminiſtration of the effects. The Solicitor therefore muſt inform himſelf of that fact.

After ſome inquiry from the Solicitor the petition *Ex parte Hardwicke* was diſmiſſed; and the order was made according to the prayer of the other petition.

Feb. 7.
Aug. 8.

Ex parte ASHLEY.

Ex parte CORSER.

A perſon, in the habit of receiving the money of a Friendly Society, having no treaſurer appointed, upon notes carrying intereſt, payable a month after demand, is not an officer of the Society, ſo as to entitle them to a preference under the ſtatute 33 *Geo.* 3. *c.* 54. ſect. 10.

RICHARD SMITH and *George Watſon*, Attorneys, in partnerſhip at *Whitchurch* in *Shropſhire*, were from the commencement of the eſtabliſhment of a Friendly Society in the habit of receiving from the Stewards the money of the Society, whenever it amounted to a ſum, which they conſidered worth placing out at intereſt; giving their promiſory notes from time to time carrying intereſt. *Watſon* died; and *Smith* became bankrupt in 1795. At the time of his bankruptcy he was indebted to the ſtewards of the Society to the amount of 145 *l.* upon his promiſory notes, payable on one month's notice; which ſum was compoſed of principal and intereſt due on ſeveral promiſory notes of *Watſon* and *Smith*. No perſon had been appointed treaſurer of the Society.

The firſt of theſe petitions was preſented by the Steward of the Society under the Act (*a*) for the encouragement of Friendly Societies, to have the money due from the bankrupt paid by the aſſignees.

The petition came on before Lord *Roſslyn*.

Mr. Benyon in ſupport of the petition—Though there is no appointment of the bankrupt as treaſurer in the books of the Society, he was in the habit of receiving the money of the Society from time to time; in which caſe your Lordſhip has held, that a perſon receiving the money from time to time is in the nature of a treaſurer; and it is not neceſſary under the Act, that he ſhould be appointed. That is the only ingredient wanting in this caſe.

Mr. Pemberton for the aſſignees.—It is not pretended, that this bankrupt was either truſtee or treaſurer, or, that he held any office. He was an attorney in the neighbourhood; in whoſe hands the ſtewards from time to time placed the money of the Society; for which he gave them ſecurity. A prior clauſe (*b*) in this

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(*a*) Stat. 33 *Geo.* 3. *c.* 54. The clauſe (ſect. 10.) is ſtated *ante*, 99. *Ex parte The Amicable Society of Lancaſter.*

(*b*) Sect. 6.

Act authorizes the treaſurers or truſtees to place out the money on private or government ſecurities. The clauſe, upon which this petition is preſented, is expreſsly confined to money received by virtue of his office; and the intention clearly was, that only debts due by officers of the Society ſhould be preferred; not debts from people entruſted by them with the money.

Mr. Cooke (*Amicus Curiæ*) ſaid, in the caſe alluded to the party, though not formally named treaſurer or truſtee, was in fact executing the office.

Lord Chancellor—I have a recollection of it; and take it ſo. I determined upon his being in fact treaſurer. He had been ſo, I think, from the commencement of the Society, before the Act. But this is no more than the caſe of any banker.

Mr. Benyon in reply—This is not one act, but a conſtant habit, when any money was received, of paying it to theſe perſons; and when it amounted to this ſum of 145 *l.* a note was given.

Lord Chancellor—It was not a depoſit of money, and one note given: but it is admitted, that it was regularly paid to them upon intereſt; they giving their notes. In order to make intereſt of the money, they paid it to an attorney of character; taking intereſt notes upon it. I think the petition right.

Upon this judgment the order was made accordingly, that the aſſignees ſhould pay to the Stewards of the Society the ſum of 145 *l.* The other petition was afterwards preſented; praying, that the order might be diſcharged. That petition came before Lord *Eldon*.

Mr. Romilly and Mr. Pemberton in ſupport of the petition—The words of the Act are very plain. In the matter of *Spendlow* (*a*), a caſe, upon which this order was made, the party was appointed treaſurer. Another caſe, *Ex parte Aſkwith* (*b*) certainly is againſt this

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(*a*) 21ſt *December* 1798.

(*b*) 6th *June* 1795.

this petition. The objection was made, that the party was not appointed treaſurer; but the Society had lent the money to him at intereſt. The Lord Chancellor ſaid, there being no other treaſurer, his having the money in his hands was equivalent. But the particular circumſtances of that caſe do not appear. This bankrupt upon the affidavits in ſupport of the other petition could not poſſibly be conſidered treaſurer.

Mr. Benyon for the Society—The late Lord Chancellor thought this caſe the ſame as *Ex parte Aſkwith;* and there have been ſeveral orders of the ſame kind; in which this has been conſidered equivalent to an appointment. Any perſon appointed to receive the money from time to time is treaſurer for the time being.

Lord CHANCELLOR—The queſtion is a dry queſtion of fact; whether the bankrupt was or was not the treaſurer of this Society. If he was not, it is clear, the Society had not againſt individuals, with whom their officers choſe to deal, the extenſive remedies given by this Act againſt perſons holding offices under them. I do not recollect enough of the caſes cited to be able to ſtate the particular circumſtances: but I apprehend from the order in *Ex parte Aſkwith*, and what is now ſtated, thoſe deciſions went upon this, as a fact proved to the ſatisfaction of the Court, that they were to be conſidered as treaſurers; that they were in fact treaſurers; and in the order *Ex parte Aſkwith* there is an allegation, that the bankrupt entered into the Society as an honorary member; ſerved the office of preſident; and accepted that of treaſurer, under what circumſtances does not appear. No particular mode of election is pointed out by the Act: but he is in fact to be elected; and you muſt collect from the circumſtances, whether he is conſtituted treaſurer or other officer. Suppoſe, the Steward had diſtributed the money among all the bankers of this city; taking notes, payable at a month's notice with intereſt: no doubt the Legiſlature did not mean, that there ſhould be 1500 treaſurers; and yet the ſame argument would prove them all ſo. This is therefore not a queſtion of law; but, whether under the circumſtances of putting the money into the hands of the bankrupt, payable by a note at a month with intereſt, he is to be conſidered treaſurer; where there is no other. Upon my view of the Act it does not occur to me, that this bankrupt either received or retained this money by virtue of any office; or, that the circumſtance of this loan, payable at a month with intereſt, will make him a treaſurer, merely becauſe no other treaſurer was appointed; or that you ſhall imply upon the mere receipt of the money with ſuch ſecurity, that he is a treaſurer, either ſelf-elected, or with the approbation of the Society; for it would go this length; that every one receiving the money would be treaſurer; if no other was elected. The treaſurer is to be the creature of election. A preceding clauſe (*a*) of the Act has clearly contemplated this caſe. Under that clauſe if there was a treaſurer, or, if not, a truſtee, who laid out money upon private ſecurity of this ſort, the perſons would have the money in their hands; but the Legiſlature confines the ſpecial remedy to the caſe of thoſe, who have it, not as debtors merely, but in that character, and alſo as having charged upon them duties and truſts; for the clauſe giving this ſpecial and extenſive remedy does not give it to thoſe, to whom the officers of the Society have lent the money; but ſtops ſhort. The 8th ſection is alſo material. If the relation, in which this perſon ſtood to the Society, was formed by a ſecurity, in which they expreſsly ſtipulate, that he ſhall not pay over the money upon demand, can the intention of the tranſaction be to place him in an office, the perſon exerciſing which the Legiſlature has ſaid ſhall pay it over on demand; upon whom therefore the Society might contrary to the ſtipulation of the note call to have it paid over at a moment's notice? Obſerve the conſequence in another reſpect. If benevolent perſons ſhould give theſe Societies property, or, if perſons ſhould withhold money, which they had a right to demand, the Society would under this conſtruction of the Act be enabled to call upon this perſon as treaſurer; and would file their bills, and defend their ſuits, in his name. He muſt therefore be a perſon elected, and accepting the office; and it is too much to ſay, a perſon, to whom their money is lent upon this ſort of ſecurity, is *ipſo facto* to become the treaſurer by the fact of that loan, liable to the duties, inconveniences, and obligations, impoſed by the Act upon the officers.

Therefore, not meaning to ſay, the caſes referred to are not rightly decided, if the Lord Chancellor collected, that the parties had accepted the office, however elected into it, it does not appear to

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(*a*) Sect. 6.

to me, that it ever was the intention to conſtitute in this perſon the character of treaſurer; and it is impoſſible to argue it ſo high from the mere fact of his becoming a debtor to the Society, that he became an officer of the Society; and then it is clear, they have not this remedy againſt him. Reverſe the order; and let them prove the debt under the Commiſſion.

Ex parte RICKETTS.

Aug. 10.

The time enlarged for a bankrupt; who had omitted to finiſh his examination: but the order would not diſcharge a proſecution for the felony.

THE petition ſtated, that the petitioner, a bankrupt, had ſurrendered; and attended upon his examination. On the laſt day, the 25th of *April*, the examination not being finiſhed, the meeting was at his requeſt adjourned to the 21ſt of *May*. On the 20th he attended the aſſignees at *Briſtol*; and returned to *Charlcomb* near *Bath* to ſearch for more vouchers; but not being able to find any he did not attend again; being ill, and almoſt in a ſtate of mental derangement from the threats of the aſſignees, that he would be committed. The aſſignees denied, that they had threatened him. The petition alſo ſtated, that they would not let his clerk attend with him.

The prayer of the petition was, that a meeting may be appointed to finiſh the bankrupt's examination.

The Lord Chancellor made the order; obſerving, that this order would not diſcharge him from a proſecution for felony: Lord *Thurlow* had determined that.

Mr. *Mansfield* for the petition.

Mr. *Romilly* and Mr. *Bell* for the aſſignees mentioned *Ex parte Grey* (a).

(a) *Ante*, vol. 1. 195.

1801.
Aug. 10.

Ex parte CUNDALL.

Bankrupt ſurrendered in diſcharge of his bail, and diſcharged by the creditor; having never been charged in execution: this is no election; and the creditor was admitted to prove.

A COMMISSION of bankruptcy iſſued upon the 9th of *October*. In the vacation after *Trinity* Term the petitioner had ſued out a writ of *Fieri Facias* againſt the bankrupt, returnable in *Michaelmas* Term. After the bankruptcy a writ of *Capias ad Satisfaciendum* was lodged with the ſheriff, for the purpoſe of fixing the bail. The bankrupt ſurrendered in diſcharge of his bail; but was never charged in execution; and was diſcharged by the petitioner, before he had been in priſon two months. Under theſe circumſtances the petitioner prayed, that he might be admitted to prove his debt under the Commiſſion.

Mr. *Richards* in ſupport of the petition.

Mr. *Johnſon contrà*—If the bankrupt had been taken, that would have been clearly an election by the creditor; and he could not have reſorted to the Commiſſion. There is no diſtinction from the object to fix the bail. In both caſes the queſtion is, whether the creditor has had a ſatisfaction for his debt. Though not taken by the ſheriff, he was by the bail in conſequence of that writ; and was ſurrendered by them. The bankrupt was in ſubſtance, though not in form, charged in execution. Unleſs the creditor had a right to reſort to the effects at the time of the ſurrender, he cannot now.

Debtor two Terms in priſon without being charged in execution is entitled to his diſcharge.

Lord CHANCELLOR—There is this difference: if he had ſtaid two Terms in priſon without being charged in execution, he would have been entitled to his diſcharge. The creditor might have reſorted to his effects; declaring, that he would not charge him in execution. Until he charges him in execution, he is not barred. If once he proceeds againſt the effects, a Judge at Chambers would ſay, he has conſented to elect. This turns out to be a voluntary act by him ſurrendering himſelf in diſcharge of his bail. Iſſuing the writ is not enough. If he had been taken under the writ, that would be another thing. It is impoſſible to ſay, the mere ſurrender of a man in diſcharge of his bail amounts to charging him in execution by the creditor, an act, done by him, aſcertaining, what his election is; for it is upon the ground of the act of the creditor, that an execution by him after the bankruptcy is an election.

Ordered.

Aug. 8. 11.

Ex parte SMITH.

In the matter of *Hartſink* and Co.

Lien.

THE petition was preſented; claiming a lien upon a quantity of platina depoſited with the bankrupts; who were engaged in a concern, called "The original Security Bank of *Hartſink* and "Co." formed upon the plan of iſſuing notes upon the ſecurity of depoſits. Theſe notes were in this form; promiſing upon the 5th of *December* next and after that date upon demand to pay to *James Cantfort* or order 200*l.*, "being a portion of a value as "under depoſited in ſecurity for the payment hereof, according "to a receipt in our hands;" and marked with letters with reference to the property.

The property was aſſigned to *Hartſink* and Co., their executors, adminiſtrators, and aſſigns, to and for their own uſe and benefit abſolutely for ever; and the owner did for himſelf, his executors and adminiſtrators warrant and defend the ſaid platina unto the ſaid *Hartſink* and Co., their executors, &c. againſt him, the ſaid owner, and againſt all and every other perſon and perſons whatſoever.

A memorandum was indorſed, that they would permit the owner to ſhew the platina to any perſon for the purpoſe of buying or cheapening the ſame; and in caſe of any contract for the purchaſe thereof or of any part, then that *Hartſink* and Co. will deliver the ſame to ſuch buyer or buyers, if they approve the price agreed upon; and that *Hartſink* and Co. will not ſell, unleſs the owner ſhall fail to provide for and make good the payment of the notes, when due: if they fail in that, then *Hartſink* and Co. may ſell; and firſt pay the notes outſtanding, intereſt, &c., and if the owner ſhall provide for and take up the notes, and indemnify niſy *Hartſink* and Co., then they ſhall reſell and redeliver to the owner all ſuch parts remaining.

The petition was preſented by the indorſee of three notes iſſued upon the depoſit of the platina. The affidavit of *Hartſink* ſtated, that a lien was intended.

The Solicitor General in ſupport of the petition—In addition to the affidavit of *Hartſink*, that a lien was intended, the circumſtance, that the property was marked, and the terms of the notes, imply a lien; and the other conſtruction will operate a groſs fraud.

Mr. Richards contrà inſiſted, this was only a depoſit of value, not a lien.

The Lord CHANCELLOR ſaid, this was a queſtion of a good deal of difficulty upon the demand ariſing out of theſe inſtruments; and ſuggeſted, that a bill ought to be filed.

Aug. 11.

The parties conſented to take the directions in bankruptcy; and came to an agreement as to all except as to the exceſs of the bills iſſued beyond the value of the platina.

Lord CHANCELLOR—If the bankrupts iſſued bills to the amount of 1,500*l.*, when the ſecurity was worth only 1,000*l.*, that is a fraud by them as to the 500*l.* exceſs. If they take out bills to the amount of 500*l.*, they put it then, as it ought to be; and redeem themſelves from the fraud. Conſequently the platina is liable to the firſt bills for 1,000*l.* then out; and the aſſignees can be in no better ſituation than the bankrupts. They ſtate upon the face of the bills, that they are for value received in the article depoſited as a ſecurity. It is an aſſertion therefore upon every bill, that they have full value in that article for that bill; and they cannot as againſt third perſons allege, that they have not platina to that value. If they cannot as againſt third perſons allege that, it neceſſarily drives them out of the account. The fundamental vice of this bank was iſſuing bills far exceeding the value of the property depoſited.

The order was made by conſent according to the minutes agreed upon; with a previous declaration, that the holders of the bills have a right to have the platina applied in diſcharge of them.

Ex parte BLOXHAM.

Aug. 11.

Creditor having ſecurities of third perſons to a greater amount than the debt may prove and receive dividends upon the full amount of the ſecurities to the extent of 20*s.* in the pound upon the actual debt.

KIRKPATRICK, of *Liverpool*, having an account with the petitioners as his bankers, from time to time remitted bills to anſwer his drafts, and among others ſix bills drawn by him and accepted by the bankrupts *Young* and *Glennie*. *Kirkpatrick* alſo becoming bankrupt, the petitioners proved under his Commiſſion the ſum of 3,234*l.* 12*s.* 11*d.*, due to them upon a balance of accounts. They alſo proved under the Commiſſion againſt *Young* and *Glennie* the ſum of 3,869*l.* 10*s.* 3*d.*, the amount of the ſix bills accepted by them. A dividend of 2*s.* in the pound was declared under the Commiſſion againſt *Young* and *Glennie*; which dividend was paid to the petitioners upon the ſum of 3,234*l.* 12*s.* 11*d.* only, without prejudice: the aſſignees refuſing to pay the dividend upon the reſidue of the amount of thoſe acceptances; ſuggeſting, that the petitioners were entitled to receive a dividend only upon the actual balance due to them from *Kirkpatrick*. No dividend had been declared under the Commiſſion againſt *Kirkpatrick*.

The prayer of the petition was, that the aſſignees under the Commiſſion againſt *Young* and *Glennie* may pay to the petitioners the dividend of 2*s.* in the pound upon the reſidue of the ſum of 3,869*l.* 10*s.* 3*d.* proved by them; and that they may receive upon the whole of the ſaid ſum future dividends, not exceeding 20*s.* in the pound upon the debt due to them from *Kirkpatrick*: the petitioners inſiſting, the bills accepted by *Young* and *Glennie* are to be conſidered collateral ſecurities, to be retained, until the

whole

whole of the debt due to them from *Kirkpatrick* ſhall be fully ſatisfied.

Mr. Mansfield and Mr. Cooke in ſupport of the petition inſiſted, that the deciſion upon the petition *Ex parte Bloxham* in the bankruptcy of *Purdy* (*a*) was againſt all the former orders; *Ex parte Croſsley* (*b*); *Ex parte King* (*c*); and others before Lord *Thurlow* and Lord *Roſslyn*.

Mr. Richards for the aſſignees inſiſted, that they were right in confining the dividend to the actual debt; and ſaid, *Kirkpatrick* was indebted to theſe bankrupts.

Creditors having in ſecurities of third perſons to a greater amount than the debt may prove and receive dividends upon the full amount of the ſecurities to the extent of 20*s.* in the pound upon the actual debt.

Lord Chancellor—I looked upon it as ſettled, that you cannot hold the paper of the bankrupt, and prove beyond your actual debt upon it; but that you may have the paper of third perſons, thoſe perſons being indebted to your debtor in more, and you may prove to the whole amount; not exceeding 20*s.* in the pound upon the original debt. Suppoſe, you owe 1,000*l.*, and as a ſecurity aſſign a bond for 2,000*l.*: cannot the creditor prove the 2,000*l.*, till he gets the 1,000*l.*? The petitioners are creditors of *Young* and *Glennie* for the whole amount of their acceptances; they are creditors of *Kirkpatrick* for leſs: in this ſituation they have a right to apply their legal demand againſt *Young* and *Glennie* to the extent of obtaining the full amount of their actual debt. The caſe is no more than this: *Kirkpatrick* had an account with the petitioners; and ſent them bills accepted by this bankrupt from time to time to cover that account. If the petitioner can only prove the amount of their debt, they have not the full benefit of the ſecurity. It is not material, that *Kirkpatrick* was indebted to *Young* and *Glennie*; for you cannot attach equities upon bills of exchange. The petitioners therefore muſt prove the amount of that paper, given to them to ſecure that debt.

Ordered.

(*a*) *Ante*, vol. 5. 448.

(*b*) 1 *Cooke's* Bank. Law, 158. 3 *Bro. C. C.* 237.

(*c*) 1 *Cooke's* Bank. Law, 157.

Ex parte BAINBRIDGE.

Aug. 10. 12.

Order under ſtatute 5 *Geo.* 2. *c.* 30. *ſ.* 31., that new aſſignees may be choſen, and that the Commiſſioners may execute a new bargain and ſale and aſſignment, the former being vacated: all the aſſignees being dead; and the heir at law of the ſurvivor an infant.

All the aſſignees under a Commiſſion of bankruptcy being dead, and the ſurvivor having left an infant heir at law, this petition was preſented; praying, that two new aſſignees may be choſen; and that the Commiſſioners may execute a new bargain and ſale and aſſignment; the former being vacated.

The Lord Chancellor ſaid, it was very right, if it ever had been done: but the difficulty was to find a precedent.

Mr. Piggott in ſupport of the petition produced an order for that purpoſe; *Ex parte Bury*; the aſſignee being dead; and there being a repreſentative.

Lord Chancellor—That was the caſe of a proviſional aſſignee; which makes all the difference; for the full aſſignment deveſts his eſtate: but nothing can take it out of this infant heir of the ſurviving aſſignee.

Mr. Piggott ſaid, there was no difference in that caſe; as they always make the proviſion of aſſignee join.

Mr. Cooke (*Amicus Curiæ*) ſaid, Lord *Roſslyn* had made an order of this ſort under the authority of the ſtatute (*a*).

Aug. 12.

Lord Chancellor—I think, this may be done. The act of Parliament gives the authority.

Ordered.

(*a*) Stat. 5 *Geo.* 2. *c.* 30. *ſ.* 31.

1801.

July 17. 24. *Aug.* 12.

THE ATTORNEY GENERAL *v.* GREEN.

A long leaſe of a charity eſtate in 1715 at a great undervalue decreed to be delivered up; and an account directed with juſt allowances.

IN 1715 the charity eſtate, the ſubject of this information, then let at 31*l.* a year, having upon it ſome buildings conſiderably out of repair, was demiſed by the truſtees to the grandfather of the defendant for the term of 999 years in conſideration of an additional rent of 4*l.* a year, and the ſum of 500*l.* at leaſt to be laid out in repairs. The annual value at preſent is between 90*l.* and 100*l.*

Mr. Richards and Mr. Johnſon for the Relators. Mr. Romilly for the Defendant.

This was conſidered a new caſe; and ſtood for judgment.

Aug. 12.

Lord CHANCELLOR—I can find no precedent for the regulation of the judgment of the Court in ſuch a caſe. I take the defendant to be the perſonal repreſentative of his grandfather; to whom this charity eſtate was demiſed by this leaſe; which is in effect a purchaſe of the perpetuity for that increaſed rent of 4*l.* a year and the ſum to be laid out; making the fund, that was to produce the old rent and that additional rent, ſo much better ſecurity as an expenditure not to be ſhort of 500*l.* would make it. It is impoſſible, that a perſon taking in good faith would take ſuch a leaſe as that. The difficulty is how to give a perſon not taking in good faith the benefit of that ſituation, that I would give a truſtee laying out money for the benefit of the charity, and deſiring for his own benefit that ſort of intereſt in the charity fund, that would ſecure him the repayment. I am in a good deal of difficulty how to deal with the caſe. I apprehend, the reſult of an inquiry, having the object of ſecuring the leſſee that benefit, would be, that he is already paid. He muſt have credit for having paid the original and additional rent. He cannot have credit againſt the charity for having expended more than 500*l.*; for it would be much too dangerous to inquire by the evidence of perſons making valuations now, and ſpeculating upon the price of buildings in 1715 and the poſſible value of what they conceive, for they cannot know any thing, as to the value of the old materials upon the premiſes. It is ſafer therefore to proceed

1801.

The Attorney General v. Green.

upon the evidence the deed furniſhes; concluding, that the truſtees called upon him to lay out not leſs than 500 *l.*, and to ſay, that is all he ought to be taken under theſe circumſtances to have laid out. If ſo, he muſt have 25 *l.* a year intereſt upon that 500 *l.* ſince the expenditure; which with the rent would be 59 *l.* a year. Then, this intereſt being ſatisfied by that rent, the queſtion upon the inquiry would be, whether the 500 *l.* muſt not be ſatisfied now by the exceſs of the rent beyond the 59 *l.* a year, about 30 *l.* a year, going to ſink the principal; which would be entirely ſunk in eighteen years, I muſt either order him to deliver up the leaſe without any allowance, or direct the inquiry, whether the principal of the 500 *l.* has been paid by the exceſs of the rent beyond the rent reſerved and the intereſt of the 500 *l.*; and reſerve the conſideration of what is fit to be done till after that inquiry. In theſe caſes it is neceſſary upon a general principle to hold a ſtrict hand upon a perſon in the ſituation of this defendant; for where truſtees make a leaſe of this kind to the deſtruction of the charity eſtate, it goes on undiſcovered for a vaſt while.

Aug. 12.

Mr. Romilly obſerving, that it was proved, that large ſums had been expended lately upon the buildings beyond the 500 *l.* and 100 *l.* a very few years ago, the Lord Chancellor ſaid, he was not aware of that; and the Relators not objecting to that inquiry, it was directed by conſent; and the defendant undertaking to deliver up the leaſe to be cancelled, and account for the rents and profits from the deceaſe of the late vicar, the decree was made without coſts.

1801.

SITTINGS BEFORE

Michaelmas Term,

42 GEO. 3. 1801.

Oct. 30.

Ex parte THE DUCHESS OF NEWCASTLE.

The Court refuſed to make an order under an act of Parliament for the ſale of eſtates upon the opinion of a conveyancer, approving a conveyance, without a reference to the Maſter.

UNDER an act of Parliament for the ſale of eſtates of the Duke of *Newcaſtle*, directing the conveyance to be ſuch as the Court ſhould think proper, a motion was made by Mr. *Sutton* upon the opinion of a conveyancer, that a deed of appointment would be the proper conveyance.

The Lord CHANCELLOR diſapproved the practice of coming upon the opinion of a conveyancer; and referred it to the Maſter.

Nov. 5.

SHERWOOD *v.* SMITH.

Maintenance allowed for the time paſt as well as the time to come.

LEGACIES of 500 *l.* each were given to grand-children by the will of their grandfather. Some of them preſented a petition, praying an inquiry, whether their father has been and is of ability to maintain and educate them; by whom they have been maintained and educated ſince the death of the teſtator; whether any and what allowance hath been made; and what will be the proper allowance for maintenance and education for the time paſt from the death of the teſtator, and for the time to come, until their ages of twenty-one, or farther order. The father had only an income of 120 *l. per annum*, and a large family.

Mr. Richards in ſupport of the petition ſaid, the practice now is to inquire as to the time paſt as well as the time to come.

The Lord CHANCELLOR ſaid, he underſtood the practice to have been altered in that particular; and made the order accordingly.

———— *v.* OSBORNE.

Nov. 6. 13.

On motion a reference directed to inquire, whether the defendant, a truſtee, remains accountable for any acts done by him as truſtee, and, if not, to ſettle a releaſe.

THE bill was filed by creditors againſt the executors and deviſees in truſt, ſubject to the payment of debts. All the eſtates were ſold under the decree.

Mr. Wooddeſon for the defendant Oſborne moved for a reference to the Maſter to appoint a new truſtee in his room, and to ſettle the form of a releaſe, and diſcharge him from the truſt, on the ground, that he had never acted, or received any part of the purchaſe money; and that he was of a very advanced age.

The motion was made on the firſt day of Term before the Maſter of the Rolls, ſitting for the Lord Chancellor, who expreſſed doubts, whether it could be done without a ſuit; and directed the motion to be made before the Lord Chancellor.

Lord CHANCELLOR—It would be a dangerous proceeding upon a mere ſtatement at the bar to order a truſtee to convey, and ſo diſmiſs him; as if there was no demand againſt him. It is not the courſe of the Court to look through all the proceedings. Refer it to the Maſter to look through the proceedings, and to ſee, whether this defendant remains accountable for any acts done by him as truſtee; and in caſe he does not, then to ſettle a releaſe.

July 20.
Aug. 12.
Nov. 13.

PELLEW *v.* ———.

A reference of an anſwer for impertinence is waived by a ſubſequent reference for inſufficiency.

THE plaintiff on the 25th of *June* obtained an order referring the anſwer for impertinence. On the 2d of *July* he obtained another order, referring the anſwer for inſufficiency. Theſe references were made to different maſters. Warrants were taken out upon both: but no farther proceeding took place under the reference for impertinence. Under the reference for inſufficiency a Report was obtained; eſtabliſhing four Exceptions, and overruling two. A motion was made for the defendant to diſcharge the order of reference for impertinence.

Mr. Hall in ſupport of the motion—The ſubſequent order of reference for inſufficiency was a waiver of the former order. There is a diſtinction between ſcandal and impertinence: as to the former, the Court takes care to keep its records pure: but taking any ſtep in pleading is a waiver of a reference as to impertinence. *Lady Abergavenny* v. *Lady Abergavenny* (*a*). *Anon.* 2 *Veſ.* 631. (*b*). The judgment of the Maſter upon the inſufficiency does not weigh upon this point; for the mere act of the ſecond reference, no proceedings being had upon the former, is a waiver. Lord *Roſlyn* according to a note of a caſe on the 19th of *January* 1796 ſeemed to conſider this point clear; though it was not in judgment before him. The note ſays, that an Order referring Exceptions, after the eight days had expired, was diſcharged. There had alſo been an Order referring the anſwer for impertinence; and it was held, that the Exceptions taken to the anſwer waive the impertinence; though you may certainly refer for impertinence afterwards take Exceptions too.

According to this note it is laid down as clear, that after an order of reference for impertinence you may refer for inſufficiency. But if no proceedings are had upon the reference for impertinence, and you have had the effect of the other reference, that is a waiver of the former. In *Dixon* v. *Olmius* a plea of a Fine and Recovery of prodigious length was put in. After a reference

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(*a*) 2 *P. Will.* 311. (*b*) *Anon. Ante*, vol. 5. 656.

for impertinence the anxiety of the parties led them to ſet down the plea for argument; and that was held clearly to deſtroy the reference for impertinence. Any ſtep taken after ſuch a reference, and that reference not proceeded in, is a waiver of it; particularly in a caſe of double dilatories. The reaſon of the thing requires, and therefore it ought to be the practice, that the Report upon the impertinence ought firſt to be obtained; for paſſages may be ſtruck out upon the reference for impertinence, that would be an anſwer to the exceptions.

Mr. Romilly and Mr. Thompſon for the plaintiff—It is certainly decided, that if a party takes a proceeding in the cauſe, he cannot refer for impertinence: but it does not follow, that an order referring exceptions is a diſcharge of a prior order of reference for impertinence. That has never been decided. Upon principle can it be? The queſtions of impertinence and inſufficiency are quite diſtinct. Upon the objection, that paſſages may be ſtruck out as impertinent, that would be an anſwer to the bill, the anſwer ought in all caſes to be firſt referred for inſufficiency; and then the whole practice of the Court is wrong. What poſſible inconvenience can there be? In the inſtance, upon which that objection is made, the inconvenience is to the plaintiff; who muſt then take an inſufficient anſwer. On the other hand it would be very inconvenient, if the Report upon the impertinence muſt be obtained before a reference for inſufficiency.

Mr. Holliſt (*Amicus Curiæ*) ſaid, nothing could be found exactly in point; but that a reference for impertinence cannot be obtained after an order for time to anſwer; nor by a plaintiff after reply: it muſt be the firſt ſtep: in this caſe, until the reſult of the reference for impertinence appears, the Court cannot ſay, whether the anſwer is inſufficient.

Mr. *Holliſt* alſo cited an order to ſhew, that a reference for impertinence ſtops the proceedings.

Mr. Richards (*Amicus Curiæ*) ſaid, Lord Chief Juſtice *Eyre* thought, the reference for impertinence muſt be firſt diſpoſed of.

1801.

PELLEW
v.

Nov. 13.

After a reference for inſufficiency the anſwer cannot be referred for impertinence.

Lord CHANCELLOR—Upon the beſt conſideration of this point I think, the reference for inſufficiency before the reſult of the reference as to the impertinence is a waiver of the latter reference; for there is abundance of caſes both in print and manuſcript, proving, that if you refer for inſufficiency, you cannot afterwards refer for impertinence; and I have always underſtood the practice to be ſo. This is juſt the converſe of that: but it is very difficult to ſay, what principle ſuſtains the one, that will not ſuſtain the other. I ſhould think, upon a mere order of reference for impertinence, and nothing done upon it, and then an order of reference for inſufficiency, which order was firſt, and which laſt, would make no great difference; for the good ſenſe is, that the reſult of the reference for impertinence ſhould be known, before you refer for inſufficiency; that the Maſter, to whom that is referred, ſhould have the purified record, if I may ſo expreſs it, before him. Therefore what I underſtand Lord *Roſslyn* to have ſaid in the note, that has been cited, is, that if the reference for impertinence has been gone through, then, the Record being, as it ought to be, you may refer for inſufficiency. To examine the two points together would be very inconvenient for this reaſon; that if the reference for impertinence is in one Maſter's office, and the other reference in another, one Maſter, conſidering, whether the anſwer is ſufficient, may ſay, it is, becauſe a paſſage is in it, which very paſſage may be by the other Maſter ſtruck out, as impertinent; and the former might think it not impertinent. At all events it is impoſſible, that theſe two orders can be executed by two different Maſters; as I cannot expect that two Maſters will agree as to what is or is not impertinent; feeling, how difficult it is in the caſe of *Hughes* v. *Williams* (*a*) to ſay, what is impertinent.

In this caſe what I have been conſidering is, whether, there being clearly a want of accurate knowledge as to the practice, I may not in this particular inſtance ſtay the proceedings upon the reference for inſufficiency; that I may know the reſult of the reference as to the impertinence; and then ſend the purified Record to the Maſter upon the inſufficiency; declaring the practice

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(*a*) The next caſe.

for the future. I think, therefore, the beſt way is to let the reference for impertinence go on; declaring, that this is not to operate as a precedent in future.

HUGHES v. WILLIAMS.

Aug. 1. 12.
Nov. 13.

Objections to interrogatories ſettled by the Maſter muſt be taken by exceptions, not by petition, as an objection to the appointment of a Receiver.

UPON a bill of foreclоſure the uſual accounts were decreed; and the plaintiff having been in poſſeſſion, it was directed, that he ſhould be examined upon interrogatories; which were ſettled by the Maſter. The plaintiff preſented a petition; praying, that certain parts of the interrogatories may be expunged, as impertinent.

Upon a doubt ſuggeſted, whether the objections ought to be made by petition or exceptions, Mr. *Thomſon* for the defendant ſaid, that, where the report does not require confirmation, the courſe is to petition againſt it: but in the caſe of a report of the inſufficiency or impertinence of an anſwer the proper mode is by exception; which muſt be filed in a limited time, and with a depoſit.

Mr. *Richards* in ſupport of the petition.

Lord CHANCELLOR—I have no doubt, that exceptions will do: but it is very queſtionable, whether this can be done by petition. I think, it is quite out of the reach of the principle, that this can come on in this way; for then the party will have a right to petition without calling upon the Maſter to conſider the objection. That is not the caſe upon exceptions. The objection to the appointment of a receiver is a queſtion upon a dry, ſimple, fact; that the Maſter has approved a particular perſon.

Nov. 13.

The Lord CHANCELLOR ſaid, he was ſatisfied, the proceedings upon the impertinence of the interrogatories may be by exceptions; which were filed accordingly.

1801.
Nov. 13.

DARE *v.* TUCKER.

A purchaſer, who cannot have the original title deeds, the eſtate being ſold in a great number of lots, is entitled to atteſted copies at the expence of the vendor, notwithſtanding the inconvenience and expence.

MR. *Hart* on behalf of a purchaſer moved for an order, that atteſted copies of title deeds ſhould be delivered at the expence of the vendors; inſiſting upon the ordinary rule, that a purchaſer has a right to atteſted copies of deeds relating to his eſtate with others; where, his eſtate being of inferior value, he cannot have the originals.

Mr. Romilly for the truſtees oppoſed the motion upon the authority of a caſe before Lord *Roſslyn*, and the great inconvenience, the eſtate having been ſold in 144 lots, and upon an undertaking that there ſhould be a covenant for the production of the deeds, but no atteſted copies; which was denied by the purchaſer.

Lord CHANCELLOR—This is of great conſequence. There being 144 lots in the ſale of this eſtate, what an infinite number of atteſted copies may be neceſſary. The old practice was preciſely according to the motion. The caſe before Lord *Roſslyn*, I apprehend, went upon a covenant, as matter of agreement upon the ſale, that the vendor ſhould produce the original title deeds; and Lord *Roſslyn* conſtrued it, not only, that he engaged to produce the title deeds, but as a negative ſtipulation, that he ſhould not give atteſted copies. The preſſure of the Stamp Duties, I believe, led to that determination. Purchaſers have ſet a value upon theſe atteſted copies, which does not belong to them. They are waſte paper upon an ejectment, unleſs between the parties themſelves. It has ſtruck me as very convenient, that a ſhort Act of Parliament ſhould be paſſed, declaring, that a copy certified by the Maſter to be a true copy ſhould be evidence. I think, you muſt give them atteſted copies, unleſs you leave the originals, or make ſome other propoſal in the Maſter's Office. It will throw a prodigious expence upon the truſt, if all the purchaſers are to have atteſted copies; and yet I rather think, they are entitled. What is now required is reaſonable enough; not copies of all the deeds, but only ſo far back as to make a title: that is, an eſtate tail, that has been barred (*a*).

(*a*) Mr. *Hart* ſaid, that in *Bird* v. *Le Fevre* the lots were more than 200; and the copies came to 1,000*l*.

1801.

INNES *v.* MITCHELL.

Rolls.
June 9, 11, 15.

Bequeſt of the debt, which ſhall be owing on a particular day, taken, as it ſtood on that day; and not affected by conſignments from the *Weſt Indies* on account ſince the death of the teſtator, which happened previous to the day ſpecified.

William Innes by a codicil, dated the 20th of *June* 1790, after ſeveral legacies, proceeded thus:

" Tenthly, I give to the eldeſt ſon of my late nephew *Alexander Innes* and of *Janet Sharpe* the mother all the debt which " ſhall or may be owing to me by the late *John Crawfurd* of " *Bellſield* eſtate in *Jamaica* on the 1ſt day of *January* 1794 " ſay 1794 whether by bond mortgage or open account to " the ſole uſe of my ſaid grand-nephew ſubject to his paying to " his brothers I think there are two of them one hundred pounds " each during their lives or only fifty pounds I mean yearly in " caſe ſuch debt does not exceed eight thouſand pounds Sterling " or that his two brothers ſhall be entitled to one-fourth part of " the yearly intereſt at 5 *per cent.* on whatever the ſum or debt " may be owing by *Bellſield* eſtate."

By another codicil, dated the 23d of *March* 1793, the teſtator taking notice of the above bequeſt goes on as follows:

" 3d, In page 7th I give all the debt which ſhall be owing by " the late *John Crawfurd* of *Bellſield* eſtate at the 1ſt of *January* 1794 which I now alter to the 1ſt of *January* 1796 " ſubject to the ſaid eldeſt ſon of the ſaid *Alexander Innes* now " *Thomas Innes* to whom that debt is given on his paying to his " two brothers one-fourth part of the intereſt of the ſum ſuch " debt may happen to be at my death at the rate of 5 *per cent.* " during the lives of both or only one of ſuch brothers."

The teſtator died on the 14th of *January* 1795.

Upon the bill of *Thomas Innes* againſt the executors two points were made: 1ſt, that the plaintiff became entitled to the debt bequeathed to him upon the teſtator's death: 2dly, that, if the Court ſhould be of opinion, he was not entitled to the debt until the 1ſt of *January* 1796, the executors had by undue management with the executor of *Crawfurd*, who was the brother of one of them, for the purpoſe of diſappointing the plaintiff's legacy in favour of the reſiduary legatees, diminiſhed the debt at the firſt of *January* 1796. By a decree made at the Rolls in *June* 1799 various inquiries were directed as to the amount of the debt at the death of the teſtator, and what had been remitted on account between that period and the 1ſt of *January* 1796.

The Maſter's report ſtated, that the debt at the death of the teſtator was 15,405 *l.* 2 *s.* 4 *d.*, excluſive of judgments, to the amount of 3,855 *l.* 8 *s.* 10 *d.* According to the uſual courſe of dealing the balance upon the 1ſt of *January* 1796 would have been 14,517 *l.* 16 *s.* 3 *d.* beſides judgments; and no part of the ſum of 3,000 *l.*, which the executors upon the 31ſt of *December* 1795 carried to the credit of the debt, would have been ſo carried, if the teſtator had lived to 1796. The report then ſtated a correſpondence between the executor of *Innes* and the executor of *Crawfurd*; in which the latter was directed to conſign over to the former the whole crop within the year 1795, and to avoid drawing bills until after the 1ſt of *January* 1796; ſtating the purpoſe to be to vary the amount of the debt by an acceleration of payment on account of the difference it will make in favour of the reſiduary legatees. In conſequence of thoſe directions credit was taken for the 3,000*l.* the net proceeds of the crop of 1794, on account of the *Bellfield* eſtate. The report then ſtated the accounts, the ſtate of the debt, and the application of the produce of the eſtate for ſeveral years.

Exceptions were taken by the defendant to the report.

Mr. Piggott, Mr. Romilly, and Mr. W. Agar for the exceptions.

Mr. Alexander and Mr. Cullen for the report, upon the firſt point inſiſted upon the caſe of *Hutcheon* v. *Mannington* (*a*), and the wiſdom of the rule eſtabliſhed in that caſe, confining the time to the death of the teſtator; and for that purpoſe even rejecting poſitive words, rather than leave it to the management of executors to aſcertain the amount.

(*a*) *Ante*, vol. 1. 366. *Gaſkell* v. *Harman*, *ante*, 159. *Sitwell* v. *Bernard*. *Poſt*.

The Maſter of the Rolls—The words of the firſt codicil create no doubt as to the time, at which the principal legatee ſhould take his legacy: the period, at which it was intended, that he ſhould take the debt, being evidently the 1ſt of *January* 1794; which by the ſubſequent codicil is altered to the 1ſt of *January* 1796. That is all, that can properly be ſaid to be a queſtion of conſtruction. It is contended, that no payment was made from *Auguſt* to the 1ſt of *January* 1796. On the other hand it is inſiſted, that a diminution took place in that interval: the executors contending, that the conſignment of ſugars made in the intermediate time by the managers to the executors is to be taken as a diminution of the debt over and above all the charges. The plaintiff contends, that no part of that was to be carried over, until the actual balance was aſcertained. If the receipt of a conſignment has never been conſidered as a payment, how can it be ſo conſidered in this caſe? The queſtion is, I admit, whether there was an actual payment. Clearly there was no actual payment. There was no ſum upon the 1ſt of *January* or at any other time, which could have been handed over. The executor, if he had been called on for that purpoſe, would have refuſed to hand over the money; and would have ſaid, he was under acceptances for more than that. It is ſaid, that, if a bankruptcy had happened, the property could not have been got out of the hands of the conſignee: no; for there would have been a lien. Upon the whole the teſtator muſt be taken to have intended the debt, as it ſtood upon the 1ſt of *January* 1796, and the amount to be aſcertained without any regard to the amount of the conſignments in 1795; and therefore it is to be taken, as it ſtood upon the 10th of *Auguſt* 1795.

1802.

Rolls.
Nov. 12. 16.

INNES *v.* MITCHELL.

Bequeſt of an annuity of 200*l.* for the uſe of *A.* and her children, to be paid out of the general effects until it is convenient to the executors to inveſt 5,000*l.* in the funds in lieu thereof for her and their uſe, and to the longeſt liver, ſubject to an equal diviſion of the intereſt, while more than one alive: held an annuity, not an abſolute legacy.

WILLIAM INNES having by his will given ſeveral annuities, and directed the mode of payment by inveſting a convenient ſum, by a codicil, dated the 20th of *June* 1790, made the following bequeſt:

"I give to Mrs. *Janet Innes* relict of my late nephew *Alexander Innes* two hundred pounds *per annum* for the uſe of herſelf and children which annuity is to be paid out of my general "effects until it is convenient to my executrix and executors to "inveſt five thouſand pounds in the funds in lieu thereof for her "and their uſe and to the longeſt liver of her and her children "ſubject to an equal diviſion of the intereſt while more than one "of them alive."

The teſtator died in *January* 1795. The bill was filed in *January* 1799 by *Janet Innes* and her three children againſt the executors; praying, that the defendants may be decreed to inveſt the ſaid ſum of 5,000*l.* in ſatisfaction of the bequeſt, and to pay the plaintiff intereſt thereon ſince the time they have had aſſets in their hands ſufficient to ſatisfy the ſame: the plaintiff *Janet Innes* ſubmitting to allow what ſhe had received in reſpect of the annuity of 200*l.*; that an inquiry may be directed, to aſcertain, when they received ſuch aſſets; and an account of the perſonal eſtate; and in caſe the Court ſhall be of opinion, that the plaintiffs are not abſolutely entitled to the ſaid 5,000*l.*, that they may be declared entitled to the intereſt thereof during their lives and the life of the ſurvivor of them, &*c.*

The defendant, the acting executor, by his anſwer ſtated, that he is unable to ſet forth, whether the perſonal eſtate will be ſufficient to pay the legacy claimed by the bill; unleſs it is to be preferred to common pecuniary legacies.

Mr. Alexander and Mr. Cullen for the plaintiffs—The firſt conſideration is, whether this is an abſolute legacy of 5,000*l.* The expreſſion, "until it is convenient" in this codicil can receive no other conſtruction than this: as ſoon as the executors have received clear aſſets applicable to the diſcharge of the legacy. The ſecond point is, whether this continues to be a mere annuity, or, whether the legatees are not entitled to the intereſt of the 5,000 *l.* during their joint lives; and the ſurvivor to take the capital of the whole. The latter part of the clauſe "ſubject to an equal "diviſion of the intereſt, while more than one of them alive," upon which it will be contended, that they are not to have any intereſt in the principal, will not detract from the prior abſolute gift.

Mr. Romilly and Mr. Leach for the defendant—The queſtion is, whether the principal or the intereſt only of 5,000 *l.* is given. The uſe is clearly applied only to the intereſt; to an annuity, as long as it is in the ſhape of annuity, without a capital, and the intereſt of the capital, when that capital is inveſted. The ſame direction is given as to the annuity to his wife and the other annuities; that a particular part of his property ſhall be ſet apart for the payment of that particular annuity. If theſe plaintiffs were entitled to the 5,000 *l.* immediately, of what uſe is the direction, that it ſhall go to the longeſt liver of them? The annuity of 200 *l.* is the ſubſtantive gift: the will then directs, out of what fund that is to come: the ſubſequent words are mere limitations of the gift. That conſtruction is ſenſible and conſiſtent: the other ſuppoſes a ſecond ſubſtantive gift. Then ſuppoſe, the mother had died the day after the teſtator, the conſequence would have been, that the children would have had nothing, till the 5,000*l.* was inveſted.

Mr. Alexander in reply—The other parts of the will as to the other annuities do not apply: the continuance of thoſe annuities being diſtinctly expreſſed, and the words of this bequeſt having a contrary import, the inference is directly the reverſe. How can this be a continuance of the ſame annuity? The caſe put of the death of the mother, before the 5,000 *l.* ſhould be produced, and the conſequence, that the children would be unprovided for, are not material. Theſe diſpoſitions are in a very inaccurate inſtrument: but I do not conceive, that conſequence would follow. The children would notwithſtanding her death be entitled to the annuity, until the other proviſion ſhould be made.

1801.
Innes
v.
Mitchell.
Nov. 16.

The Maſter of the Rolls—It is very difficult to form any deciſive opinion upon a codicil ſo very obſcurely penned: but I am inclined to think, it was not the intention of the teſtator to give a principal ſum, but only to ſecure an annuity. It is a mode taken by the teſtator in many parts of his will; giving annuities; and directing the mode, in which they ſhall be paid. The difference here is, that 5,000 *l.* is directed to be inveſted in lieu thereof; but ſtill for the ſame purpoſe, I apprehend; and the only difference between this and the other bequeſts is, that in the others the expreſſion is a convenient ſum: in this a ſpecific ſum is mentioned: but it is evident upon the whole, the teſtator did not mean to convert the annuity at a given period into a legacy of a ſpecific ſum; but intended, that it ſhould continue as annuity during the lives of the legatees; and the ſurvivor of them ſhould receive the whole intereſt; and, till there is a ſurvivor, all the legatees ſhall receive the whole annuity among them.

Nov. 19.

RIGBY *v.* M'NAMARA.

A perſon, who by opening the biddings has occaſioned a reſale at a conſiderable advance, though not himſelf the purchaſer, is not entitled to coſts.

UNDER a decree for the ſale of eſtates *Charles Mills* purchaſed for 2,200*l.* *Thomas Ellis* obtained an order to open the biddings upon the uſual terms, paying the coſts and making a depoſit of 500*l.* Upon the reſale *Mills* was again declared the beſt purchaſer for 3,200 *l.* A motion was made by *Ellis*, that the depoſit of 500*l.* might be repaid to him, and, on the ground of the benefit to the eſtate from his bidding, that he might be allowed his coſts of the order of reſale and paying in the depoſit.

Mr. *Stratford* for the parties entitled to the money oppoſed this as to the coſts on the ground, that this was a ſpeculation, which failed; that he opened the biddings for the benefit of himſelf, not of the eſtate; and the failure of that ſpeculation did not entitle him to the coſts.

The Lord CHANCELLOR refuſed the motion as to the coſts; obſerving, that the coſts were in the nature of a premium paid by him for the opportunity of bidding.

1801.

BOARDMAN *v.* MOSTYN.

Nov. 19.

Bill for ſpecific performance of a parol agreement to grant a farm leaſe with the uſual and cuſtomary covenants of the neighbourhood and an injunction to prevent an ejectment; the plaintiff having taken poſſeſſion. Upon the anſwer, ſtating the inſolvency of the plaintiff and various breaches of the agreement during five years poſſeſſion, to the ruin of the eſtate, the injunction was continued on an undertaking to give judgment in ejectment, go to Commiſſion, and ſet down the cauſe for next term, paying the rent into Court. Defendant alſo inſiſting on a covenant not to aſſign, that is the ſubject of inquiry as to the cuſtom of the neighbourhood.

THE bill prayed a ſpecific performance of a parol agreement made in *October* 1796, to grant a leaſe for twenty-one years of premiſes in *Wales* to the plaintiff, with the uſual and cuſtomary covenants of the neighbourhood, and an injunction to reſtrain the defendant from bringing an ejectment: the plaintiff having taken poſſeſſion under the agreement. On the anſwer coming in the defendant obtained an order to diſſolve the injunction, unleſs cauſe.

The defendant by his anſwer ſtated, that he never meant or promiſed to grant a leaſe without a covenant to prevent aſſigning without licence. He does not believe, the plaintiff laid out any money farther than a tenant would be obliged to do for raiſing crops, and which muſt have been repaid. The plaintiff committed wilful, extravagant, waſte upon the premiſes; permitting them to become impoveriſhed for want of expending the produce and manure; having ſold all the hay and corn; and having during his occupation, without conſent, cut timber, grubbed up hedges, and laid fields, before ſeparated, together, and taken down out-houſes, and ſold the lead. About *Michaelmas* 1799 he ſold off his cattle and ſtock; diſcharged his ſervants; and left nothing upon the premiſes. He was arreſted for 128*l.*, arrears of rent due at *Lady Day* 1800; and the defendant from compaſſion liberated him upon giving a promiſory note for part; upon which note he was again arreſted; and he afterwards diſcharged the debt.

The anſwer farther ſtated, that the defendant neglected to ſow barley from inability to buy ſeed; that great part of the cattle in the farm yard was not his own; that he has ſet the premiſes; and a few months ago he left his reſidence; and is gone with his family to reſide at *Liverpool*; trying to get into ſome ſort of buſineſs; and is ſupported in the litigation by his brother; and that the premiſes are going to decay. The anſwer farther ſuggeſted the defendant's belief, that the plaintiff is in inſolvent circumſtances; and ſtated ſeveral circumſtances in ſupport of that allegation, ſhewing, that he was in great diſtreſs.

Mr. Romilly and Mr. Benyon for the plaintiff ſhewed cauſe againſt diſſolving the injunction.

The whole conteſt is, whether this covenant ought to be inſerted as a uſual covenant; for it is admitted, that an agreement partly executed has taken place: the anſwer ſtating, that the plaintiff entered into poſſeſſion in purſuance of it. Independent of the breaches of covenant, if the cauſe was at hearing, there would be no difficulty in decreeing a ſpecific performance. Without contending, after the doubt expreſſed by your Lordſhip upon that point (*a*), that the mere admiſſion of the agreement by the anſwer takes the caſe out of the ſtatute (*b*), this caſe is clearly out of it, the agreement being part-performed by taking poſſeſſion; which is not an equivocal act. The queſtion then is, whether the poſſeſſion ſhall be changed, before the ſubject comes to be finally ſifted upon evidence. As in *Williams* v. *Cheney* (*c*), if the plaintiff ſhould be willing to take a leaſe with the covenant, a ſpecific performance would be decreed.

With reſpect to the breaches of covenant, ſtated by the anſwer, the time is not ſpecified; though it is generally intimated, that they took place prior to 1799; and then they were afterwards waived; for the anſwer ſtates, that the plaintiff was arreſted for rent due at *Lady Day* 1800. If the defendant knowing, that theſe acts had been committed, waived them by receipt of rent, he cannot afterwards ſay, they were a forfeiture in Equity. The rule is the ſame in Equity as at Law.

Mr. Lloyd, Mr. Richards, and Mr. Pemberton, for the defendant—The injunction ought to be diſſolved. This is entirely in the ſound diſcretion of the Court. If upon the anſwer, which muſt be taken to be true, the Court finds, that continuing the tenant in poſſeſſion will ruin the eſtate, and that he is quite incompetent to perform the covenants, under the circumſtances, the change of poſſeſſion cannot be a real injury to the plaintiff.

(*a*) *Ante*, 37. in *Cooth* v. *Jackſon*. (*b*) 29 *Ch.* 2. *c.* 3. (*c*) *Ante*, vol. 3. 59.

It has never been determined, that the mere entry in purſuance of a parol agreement is ſufficient without ſomething elſe; as money laid out. The conteſt is not merely, whether there is to be a covenant not to aſſign. With reſpect to that the later deciſions in the Exchequer and before Lord *Roſslyn* in oppoſition to *Henderſon* v. *Hay* (*a*), before Lord *Thurlow*, are, that ſuch a covenant is a uſual covenant: *Folkingham* v. *Croft* (*b*). The defendant ſwears, he never intended or promiſed to grant a leaſe without ſuch a covenant. Though it is admitted, that the defendant took poſſeſſion under an agreement for a leaſe for twenty-one years, if any circumſtance happens, that renders him incapable of fulfilling his part of the contract, or, that would be a ſufficient ground for an ejectment, the other party cannot be compelled to grant a leaſe. In *Willingham* v. *Joyce* (*c*) it was held upon great conſideration, that if a man after entering into a contract of this nature committed a felony, or became manifeſtly inſolvent, the Court would not enforce the contract; and that is a very ſound determination. The ſame doctrine was held in *Brooke* v. *Hewitt* (*d*). In granting a term for ſo long a time the Court will, as matter of ſound diſcretion, ſee, whether the tenant is in a ſituation to perform his engagements. Granting a leaſe or continuing the plaintiff in poſſeſſion of the premiſes under the circumſtances diſcloſed by the anſwer will produce irreparable injury. On the other hand how can he be injured by changing the poſſeſſion: neither he nor his family being in the actual occupation? He has abandoned the poſſeſſion; and underlet; which with notice of the diſpute as to the covenant he ought not to have done: but it was from mere neceſſity. Several other circumſtances ſhew complete inſolvency. Will the Court give ſuch a tenant to any man? Enough appears to ſhew, that the bill muſt be diſmiſſed; and if ſo, for what purpoſe is the poſſeſſion to be continued except to give him an opportunity of totally diſmantling the premiſes? The inconvenience would not be near ſo conſiderable, if, the poſſeſſion being now given to the plaintiff, a ſpecific performance ſhould be afterwards decreed.

(*a*) 3 *Bro. C. C.* 632. (*b*) 3 *Anſtr.* 700. (*c*) *Ante*, vol. 3. 168.
(*d*) *Ante*, vol. 3. 253.

Mr. Romilly in reply—The queſtion now is as to continuing the plaintiff in poſſeſſion. In *Willingham* v. *Joyce* notwithſtanding the facts, that were ſtated, Lord *Roſslyn* continued the injunction. The defendant knew, the plaintiff had been a trader at *Mancheſter*, and had become a bankrupt; which is no reaſon. The facts ſtated by the anſwer are inconſiſtent; and the Court cannot ſay, the plaintiff is incapable of diſproving it. In many caſes mere poſſeſſion in purſuance of the agreement has been held ſufficient. *Wills* v. *Stradling* (*a*). No ejectment has been yet brought. Though changing the poſſeſſion will not be an injury perſonally to the plaintiff, it will to the under-tenant; who will have his remedy againſt the plaintiff.

Lord CHANCELLOR—The length, to which the Court has in fact diſpenſed with the ſtatute, makes it very difficult to be ſure of deciding correctly upon theſe motions for injunctions; for it is exceedingly difficult in this ſtage of the cauſe to collect, what of neceſſity the Court will do, when the proofs come before it; giving due attention to the deciſions, that have been made in equity upon the ſtatute. It is clear upon the plaintiff's ſtatement, that the leaſe muſt have been in the nature of a huſbandry leaſe; under which the land was to be fairly dealt with. He does not bring forward a diſpute upon that: but he ſays, that under this agreement he was to be at liberty to aſſign; and that in purſuance of the agreement he entered into poſſeſſion. The defendant ſtates a perfectly different agreement; that the tenant was not to be at liberty to aſſign; that the agreement was for a leaſe for twenty-one years, with the uſual and cuſtomary covenants of the neighbourhood; and he contends, that a covenant not to aſſign, and, I apprehend, he means underletting alſo, is a uſual and cuſtomary covenant of the neighbourhood. It is ſaid, that if the defendant admits, that poſſeſſion was taken in purſuance of the agreement, that takes it out of the ſtatute. That it may have that effect in caſes, where it appears, what the agreement was, may be clear: but *non conſtat*, that it has, where that does not appear. At the ſame time unqueſtionably the Court has gone a great way upon that. In a caſe, that came from *Malton* in *Yorkſhire*, poſſeſſion having been delivered in purſuance of a parol agreement, and a diſpute ariſing upon the terms of the agreement, Lord *Thurlow* thought

Whether the anſwer admitting poſſeſſion taken under the agreement, takes the caſe out of the ſtatute of frauds, where it is not clear, what the agreement was, *Quære*.

The Court endeavours to collect, what are the terms.

(*a*) *Ante*, vol. 3. 378.

thought proper to ſend it to the Maſter upon the ground of the poſſeſſion being delivered to inquire, what the agreement was. The difficulty there was in aſcertaining that. The Maſter decided, as well as he could; and then the cauſe came before Lord *Roſslyn* upon farther directions; who certainly ſeemed to think, Lord *Thurlow* had gone a great way; and either drove them to a compromiſe; or refuſed to go on with the decree upon the principle, on which it was made.

The great difficulty in this caſe will be upon the admiſſibility of evidence; for a parol agreement with liberty to aſſign is perfectly different from the agreement admitted by the defendant; which is an agreement under the covenants for the management and enjoyment, which the uſage of that neighbourhood would infuſe into ſuch a leaſe; and when the defendant admits, that in purſuance of the agreement, meaning that in his anſwer, poſſeſſion was taken, he does not admit, that it was taken in purſuance of the agreement ſtated by the bill: nor do I know, that the plaintiff has tendered a caſe, upon which, attending to what is denied by the anſwer, conſiſtently with the proviſions of the ſtatute it is competent to introduce the proofs: but it is not inconſiſtent, that, if the Court has the means of finding out the cuſtomary covenants, they may not prohibit aſſigning; and if they do, that they may not prohibit underletting. Perhaps, if it was *res integra*, the ſoundeſt rule would be, that, if the party leaves it ſo uncertain, the agreement is not taken out of the ſtatute ſufficiently to admit of being enforced: but in all the caſes in equity the Court has at leaſt endeavoured to collect, if they could, what were the terms the parties have referred to. Upon the nature of the agreement therefore it is impoſſible in this ſtage of the cauſe to diſſolve the injunction. *Williams* v. *Cheney* does not amount to much; for adverting to the terms of the contract the Maſter of the Rolls ſaid, it was only an agreement, that if the party could grant a leaſe, he would; and he does not ſay, what he would have done, if it had been an abſolute covenant. But I do not go upon the point as to aſſigning or underletting; which muſt be the ſubject of inquiry as to the uſual and cuſtomary covenants of the neighbourhood. Upon the other part of the caſe, taking the agreement to be ſuch as the plaintiff ſays it is, and looking to the defendant's account of the plaintiff's conduct, recollecting alſo, that his conduct is now only to be collected from the anſwer, certainly in this ſtage I do not think it right to diſſolve the injunction. On the other hand the anſwer muſt be taken to be true upon this application; particularly regarding the conſequence of changing the poſſeſſion; and looking accurately to the miſchief the defendant may ſuſtain from not changing it. The article having provided, that the eſtate ſhould be poſſeſſed in a huſbandlike manner, under covenants calculated to give it its proper value during the whole leaſe, if after five years, from 1796 to 1801, the tenant has ſo miſuſed the land, that it may be difficult to recover the value it would have had, if properly poſſeſſed, during the remainder of the term, it would be extraordinary to ſay, it is fit to give the tenant the execution of the contract, merely to give him the chance of trying to reſtore it; and if he has plainly violated his contract, it will be very difficult to perſuade me at the end of five years to grant him a leaſe, the covenants of which it is demonſtrable he would have broken, if it had been granted to him before. I do not think, the waiver by receipt of the rent prevents the defendant from deſiring the Court not to put him in the power of ſuch a tenant hereafter. Without going through all the circumſtances, which are certainly very ſtrongly ſtated in the anſwer, it is impoſſible not to ſay, this is not a very favourable caſe for the tenant *prima facie*. I do not ſay, he is to be bound by the anſwer: but it is wholeſome to take care not to uphold the injunction but upon terms, which will ſecure to the defendant the whole benefit he could have, if the injunction was not ſuſtained. An ejectment has not been brought. The Grand Seſſions will not be till *Eaſter*. If therefore he will undertake to give judgment in the ejectment without putting the defendant to expence, and go to commiſſion, and ſet down the cauſe for hearing next Term, then if the bill ſhall be diſmiſſed, poſſeſſion will be given without a trial; and if the bill ſhould be ſuſtained, no execution ſhall iſſue.

Liberty was given to amend the bill by ſtating an offer by the defendant in *November* 1800, juſt before the bill was filed, to execute a leaſe. The rent was ordered to be paid into Court. The injunction was afterwards diſſolved without oppoſition.

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WALKER v. WETHERELL.

Rolls. Nov. 19.

General rule, that a truſtee ſhall not of his own authority break in upon the capital of an infant's fortune.

THE decree made in this cauſe, upon a bill for an account againſt executors, directed the uſual reference to the Maſter, to inquire, what was proper to be allowed for the infants during their minority, and, who had maintained them.

Upon the Maſter's report it appeared, that the fortunes of the children did not amount to more than 300 *l.* each. Their mother after the father's death married one of the executors; who claimed before the Maſter ſums conſiderably exceeding the intereſt of their reſpective fortunes for their maintenance, education, and advancement. The Maſter having allowed the claim, exceptions were taken to the report by the plaintiffs, the ſurviving children.

Mr. Lloyd, Mr. Richards, Mr. Sutton, and Mr. Raynsford in ſupport of the exceptions—There is no caſe, in which an executor has been allowed to go beyond the intereſt of an infant's fortune in maintenance. In *Davies* v. *Auſten* (*a*), a very favourable caſe, the rule of the Court prevailed againſt it. The executor ought to apply to the Court for the purpoſe of any advance beyond the intereſt. Theſe allowances are very unequal: to one only 70 *l.*: to another 241 *l.*

Mr. Romilly and Mr. Hart for the defendant—This defendant married the mother of the plaintiffs, when they were very young; took them into his family; and placed them out in the world; taking one into his buſineſs; and they now complain, that he has not maintained them as paupers in a workhouſe. There is no ſuch ſtrict rule upon this ſubject. In general certainly the income only is to be applied for maintenance: but, where more has been neceſſarily paid, as in this inſtance, the Court has never ſaid, the executor has done wrong, and ſhall loſe the whole. It would be a miſchievous rule, that in no caſe a guardian ſhall allow more than the intereſt for maintenance; and that the moment the parent dies the children are to be reduced to perhaps

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(*a*) *Ante*, vol. 1. 247. *Lee* v. *Brown*, *ante*, vol. 4. 362.

10 *l.* a year for maintenance and education. In this caſe there has been no extravagance. The ſum of 241 *l.* allowed for one of the children was the amount of the fee upon placing him with a ſurgeon, and the other expences incident to that ſituation. The child, for whom 70 *l.* only was allowed, died an infant; and the plaintiffs repreſenting her have the benefit of all the ſavings.

The Maſter of the Rolls—This objection on the part of the plaintiffs is rather ungracious; for from the ſums ſtated by the Maſter there is no reaſon to apprehend great waſte or negligence; and there would be more ſolid reaſon for complaint, if he had kept them in that ſituation, in which they muſt have been, if maintained upon the intereſt of their fortune only. But my impreſſion is, that the rule has been never to permit truſtees of their own authority to break in upon the capital. I am not aware, that the Court has ever ſanctioned that conduct in a truſtee. It very rarely has occurred, that the Court itſelf has broke in upon the capital for the mere purpoſe of maintenance; though frequently for the purpoſe of putting the child out in life: but as to mere maintenance, I doubt it, even upon a petition preſented. It is a great misfortune, if the capital is ſo ſmall as not to leave a comfortable maintenance and education: but what can the Court do?

The Court very rarely has broken in upon the capital for the mere purpoſe of maintenance, though frequently for advancement.

But, whatever might be done upon particular circumſtances, it is impoſſible to ſanction a truſtee in breaking in upon the capital. There are no particular circumſtances in this inſtance upon the one ſide or the other. It is not ſhewn, that there were expectations of fortune, which made it neceſſary to provide a ſuitable education. The capital might be exhauſted in a few years. On the other hand no particular extravagance upon the part of the executor appears. On the contrary, applications were made to him by ſome of the executors, ſtating, that the children could not live upon the intereſt. This claim is therefore ungracious: but it is better, that an individual ſhould ſuffer a hardſhip, than that a general rule of the Court ſhould be broken through in a point, that would endanger the intereſts of all children. The Report therefore muſt be reviewed in that part, which allows the defendant theſe ſums.

Exceptions allowed.

AUSTEN *v.* HALSEY.

Nov. 2. 20.

ROBERT AUSTEN being ſeiſed and poſſeſſed of freehold, copyhold, leaſehold, and perſonal eſtates, and having ſurrendered the copyhold eſtates to the uſe of his will, by his will, dated the 26th of *December* 1796, and duly executed to paſs real eſtates, after directions for erecting a monument and ſome ſmall legacies for charitable purpoſes and to ſervants, gave to his dear children *Frances* and *Elizabeth* the ſum of 3,000*l.* a piece, in caſe they attain their reſpective ages of twenty-one years: but if either ſhould die, before ſhe ſhould attain her age of twenty-one years, then he directed, that the legacy of her ſo dying ſhould go to the ſurvivor: but if both ſhould die before that age, then the whole ſhould lapſe, and be wholly void. He gave to *Elizabeth Franklyn* the ſum of 1,000*l.*; and he deſired his truſtees to pay and allow ſuch ſum as they in their diſcretion ſhould think proper or neceſſary for and towards the maintenance and education of his children out of the rents and profits, intereſt and dividends, of his real and perſonal eſtate. Then, after giving his truſtees 100*l.* each, he gave, deviſed, and bequeathed, all and every his manors, meſſuages, lands, tenements, tithes, and hereditaments, freehold, copyhold, and leaſehold, (not in ſettlement) and over which he had any power of diſpoſition, and not therein before diſpoſed of, and alſo the reverſion in fee of his real eſtates in the county of *Surrey*, which are in ſettlement, and alſo all and every part of his perſonal eſtate of what nature or kind ſoever, not thereby before diſpoſed of, (except his large diamond ring, his books, manuſcripts, pictures, drawings, medals, and coins,) unto *Henry Halſey*, *Lannoy Richard Coaſſmaker*, and *William Bray*, their heirs, executors, and adminiſtrators, according to the different nature and quality of his ſaid eſtates reſpectively, in truſt to convey and aſſign the ſame real and perſonal eſtates reſpectively and all the ſavings and increaſe thereof, unto his ſon *Henry Edward Auſten*, his heirs, executors, and adminiſtrators, for ever, when and ſo ſoon as he ſhould attain his age of twenty-one years, or marry before that age with the previous conſent and approbation of his guardian or guardians, or the major part of them then living: but in caſe he ſhould marry before that age without ſuch conſent,

Charge of legacies by implication upon a fund ariſing from the accumulation of rents and profits, dividends and intereſt.

The other queſtions were not determined: 1ſt, whether the real eſtate was charged by implication from words, which could be otherwiſe ſatisfied, and, if not, whether the will directing an eſtate to be purchaſed, and ſettled upon the teſtator's ſon with remainders over, for which the teſtator afterwards contracted, and the purchaſe money having been paid out of the perſonal eſtate under a power in the will for that purpoſe, the legatees by marſhalling could have the benefit of the vendor's lien upon the eſtate for the purchaſe money.

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the teſtator directed his ſaid truſtees immediately on ſuch marriage to convey, ſettle, and aſſure, all and every part of his ſaid freehold and copyhold eſtates to the uſe of his ſaid ſon for his life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and every other ſon of the body of his ſaid ſon ſucceſſively in tail general; and, in default of ſuch iſſue, to the uſe of the firſt and every other daughter of the body of his ſaid ſon ſucceſſively in tail general; and in default of ſuch iſſue, or if his ſaid ſon ſhould die under the age of twenty-one, without having been married, then in truſt to convey, ſettle, and aſſure, all his ſaid freehold and copyhold eſtates to his (the teſtator's) daughter *Frances*, her heirs and aſſigns for ever, in caſe ſhe ſhould attain the age of twenty-three years, or marry before that time with ſuch conſent, as aforeſaid: but if ſhe ſhould marry before that time without ſuch conſent, then he directed his ſaid truſtees immediately on ſuch marriage to convey, ſettle, and aſſure, his ſaid freehold and copyhold eſtates to the uſe of his ſaid daughter *Frances* for her life, with ſimilar remainders in ſtrict ſettlement to her ſons and daughters ſucceſſively in tail general, as before limited with reſpect to his ſon; and in default of ſuch iſſue, or in caſe *Frances* ſhould die under the age of twenty-three without having been married, then with ſimilar remainders in favour of his other daughter *Elizabeth* and her children; and if ſhe ſhould die under the age of twenty-three without having been married, then to the uſe of his truſtee *William Bray*, his heirs and aſſigns for ever; and in caſe his ſaid ſon ſhould not attain the age of twenty-one, or marry before that age with ſuch conſent and approbation, as aforeſaid, then he directed his ſaid truſtees to convey and make over his ſaid leaſehold eſtates and all and every other part of his perſonal eſtate above deviſed to them, together with all the ſavings and accumulations, that ſhould be made from the produce of his real and perſonal eſtate, as aforeſaid, after payment of legacies and the purchaſe money therein after directed, unto his ſaid daughters in equal ſhares and proportions; each ſuch ſhare to be an intereſt veſted in and divided and delivered to them reſpectively, when and ſo ſoon as they ſhould reſpectively attain the age of twenty-three years or marry before that time with the previous conſent of their guardians, as aforeſaid: but if either of them die before the age of twenty-three, or marry before that age without ſuch conſent, then he gave her part or ſhare to her ſiſter, if ſhe attain the age of twenty-three years, or marry under that age with ſuch conſent; and if neither of them attain the age of twenty-three, or marry under that age with ſuch conſent, then he gave both ſuch parts or ſhares to ſuch grandchild of him (the teſtator) by either of his aforeſaid daughters as ſhould at the death of the ſurvivor of them be entitled to the poſſeſſion of his aforeſaid real eſtates under and by virtue of that his will; and if there ſhould be no ſuch grandchild, then he gave both ſuch ſhares to the perſon or perſons, who at the death of the ſurvivor of his ſaid daughters ſhould under the deviſes aforeſaid be entitled to his aforeſaid real eſtates.

The teſtator then taking notice, that certain eſtates in the county of *Surrey*, ſettled previouſly to his marriage, would deſcend to his two daughters as tenants in common in failure of his iſſue male, in caſe his ſon ſhould die under the age of twenty-one without leaving iſſue, and both his daughters ſhould be then living, gave to *Elizabeth Auſten*, or, in caſe of her death under twenty-one to the perſon or perſons entitled to her ſhare in his ſettled eſtates the ſum of 2,000*l.*, over and above the value of her, his, or their, ſhare in the ſettled eſtates, on conveying ſuch ſhare to his daughter *Frances*; to be ſettled to ſuch uſes (or ſuch of them as ſhould be then capable of taking effect) as above declared of his unſettled eſtates; and he directed, that his truſtees ſhould purchaſe ſuch ſhare of *Elizabeth* or her heirs in the ſaid eſtates in ſettlement in manner therein directed; and that ſuch purchaſe money ſhould be paid out of the truſt monies then in the hands of his truſtees under the truſts aforeſaid; and he directed, that his ſaid truſtees and the ſurvivor, and his heirs, executors, and adminiſtrators, ſhould place out all the ſavings ariſing or to ariſe from the rents, iſſues, and produce, of his ſaid real and perſonal eſtate, until his ſaid ſon or eldeſt or only daughter or ſome other perſon or perſons ſhould be entitled to a conveyance and aſſignment and delivery thereof by virtue of the directions aforeſaid, on mortgages.

The teſtator then, after the uſual clauſes of indemnity to his truſtees, directed, that his diamond ring and all his books, manuſcripts, pictures, drawings, medals, and coins, ſhould be conſidered as heir looms, and go with his manſion houſe at *Shalford* to his

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his children and their iſſue in manner above limited; provided, that no perſon taking an eſtate tail by purchaſe in his ſaid real eſtate under the limitations aforeſaid ſhould be entitled to the abſolute intereſt in the ſaid chattels, unleſs he or ſhe ſhould attain the age of twenty-one, or die under that age leaving iſſue: but if all his children ſhould die without iſſue, as aforeſaid, then he gave and deviſed his ſaid ring, printed books, pictures, and drawings, to *William Bray*, and his manuſcript books, medals, and coins, to the *Britiſh* Muſeum, except duplicates of medals and coins; which he gave to *William Bray*. Then after ſome farther directions upon that ſubject he gave the guardianſhip of his ſaid children to his truſtees until their reſpective ages of twenty-one years; and directed, that if any of the truſtees ſhould die during the minority of his ſaid child or children, ſuch child or children ſhould be made wards of the Court of Chancery. Then giving legacies of 100*l.* each to the wife of *Halſey* and the wife of *Couſſmaker*, he appointed his truſtees executors.

The will did not contain any diſpoſition of real eſtate previous to the general deviſe to the truſtees.

By a codicil, dated the 1ſt of *November* 1797, duly executed for paſſing real eſtates, the teſtator reciting, that the truſtees of Mr. *Webb* had propoſed to ſell to him the eſtate, called *Titing*, in *Surrey*, in caſe of his death before he ſhould have compleated the purchaſe directed his truſtees and executors and the ſurvivor, &c. to make or compleat ſuch purchaſe as ſoon as might be, and to ſettle the ſaid eſtate, when purchaſed, to the uſes in his will directed concerning his other eſtates; and he gave them power to apply his perſonal eſtate to that purpoſe.

The teſtator on the 2d of *November* 1797 contracted for the purchaſe of the eſtate mentioned in the codicil at the price of 7,000*l.*, and the timber to be paid for at a valuation. The next day the teſtator died; leaving his ſon and heir about the age of thirteen, his daughter *Frances*, about nineteen, and *Elizabeth* fifteen. The truſtees with the produce of the ſale of a leaſehold houſe and part of the perſonal eſtate compleated the purchaſe; and paid the debts and the ſmall legacies: but the perſonal eſtate being ſo far exhauſted as not to be equal to the other legacies, the

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the bill was filed on behalf of the two daughters againſt their brother and the truſtees; praying, that the will may be eſtabliſhed, and the truſts performed; an account and application of the perſonal eſtate; that the plaintiff's legacies may be ſecured; and, in caſe the perſonal eſtate applicable to the payment of the legacies ſhall be inſufficient, that the deficiency may be made good out of the rents and profits, intereſt and dividends, of the real and perſonal eſtate, and the ſavings and accumulations thereof, until the defendant *Auſten* ſhall be entitled to have the poſſeſſion delivered to him according to the will; and in caſe all ſuch funds aforeſaid as are applicable to the payment of the legacies ſhall fall ſhort, and be found inſufficient, then that the real eſtates deviſed by the will and codicil may be declared well charged with the payment of the legacies; and that the deficiency may be raiſed out of the real eſtate; that the contract for the purchaſe of the eſtate, called *Titing*, may be compleated; and the purchaſe money paid out of the teſtator's leaſehold and perſonal eſtates ſpecifically bequeathed, and not from the other perſonal eſtate; in order that the perſonal eſtate may be applied in payment of the legacies; that the allowance for maintenance may be directed to be taken wholly from the rents of the freehold and copyhold eſtates only; and that the reſidue of ſuch rents, and the intereſt of the clear reſidue of the perſonal eſtate, and all ſavings and accumulations of the real and perſonal eſtates, and the income and produce thereof, until the defendant *Auſten* ſhall be entitled to have the poſſeſſion delivered to him according to the will, may be appropriated and applied to the payment of the legacies; and that the aſſets may be marſhalled accordingly; and that a proper maintenance may be directed, *&c.*

The truſtees by their anſwer ſtated, that the perſonal eſtate had been ſo far exhauſted by the payment of the debts and funeral expences, and the purchaſe of the eſtate, called *Titing*, that the remainder will not be ſufficient to pay the legacies, unleſs the printed and manuſcript books and medals ſhall be ſold; or unleſs the defendants ſhall be authoriſed to pay for the maintenance out of the rents and profits of the freehold and copyhold eſtates, and to apply the ſurplus of the rents and profits thereof with the rents of a leaſehold houſe and the intereſt and produce of the other parts of the perſonal eſtate and the accumulations thereof in payment of the legacies.

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The cauſe came on for farther directions. By the Maſter's report it appeared, that the perſonal eſtate was deficient, in conſequence of the circumſtances ſtated by the anſwer: but that the accumulation of the rents and profits, intereſt and dividends, would be ſufficient to anſwer the legacies.

Mr. Mansfield and Mr. Hall for the plaintiffs—Upon the queſtion, out of what fund the deficiency of the perſonal eſtate is to be anſwered, firſt as to the general charge, every thing contained in the previous part of the will may be conſidered a diſpoſition both of the real and the perſonal eſtate to the amount of the charge; and the deviſee takes only the reſidue. That conſtruction is not too great a ſtrain. If a legacy was given, and then all the reſidue not before diſpoſed of, and nothing but that legacy was before diſpoſed of, and there was no perſonal eſtate: that would be held a real deviſe of ſo much of the eſtate as would anſwer the amount of that legacy. By this will both real and perſonal eſtates are given in the ſame ſentence; and the accumulation from the real and perſonal eſtates is given over in one event expreſsly ſubject to legacies.

Upon the other queſtion, there is a great difference in marſhalling againſt an eſtate deſcended and an eſtate deviſed. This is the caſe of an eſtate deſcended. A deviſe can operate only upon the eſtates the teſtator actually has at the date of the will; and in this inſtance the teſtator accords to the words of the ſtatute (*a*), *had* not the land either by a legal or an equitable title. In *Langford* v. *Pitt* (*b*) it was decided, that an eſtate contracted for after the date of the will cannot paſs by the will. Then, where one party has a right to reſort to two funds, and the other has one only, the Court marſhalls; making an arrangement, that will provide for the payment of every claimant. The vendor of this eſtate had a right in equity to reſort to the eſtate ſold for the payment of his purchaſe money. If any difference ariſes from taking a ſecurity for his money, none was taken in this caſe. That the vendor has ſuch right is proved by *Chapman* v. *Tanner* (*c*); and even the circumſtance of taking a ſecurity has been held not to deſtroy the right. Lord *Hardwicke* did the ſame thing in effect in *Pollexfen* v. *Moore* (*d*), a perplexed caſe; and in *Walker*

(*a*) 32 *Hen.* 8. *c.* 1. 34 *Hen.* 8. *c.* 5. (*b*) 2 *P. Will.* 629. (*c*) 1 *Vern.* 267.
(*d*) 3 *Atk.* 272.

v. Preſwick (*a*), the caſe of a ſhip, his Lordſhip lays down the ſame doctrine as to land; which is followed by Lord *Loughborough* in *Blackburn* v. *Gregſon* (*b*); where bonds were taken, and part of the money was paid. At the death of this teſtator no part of the purchaſe money was paid; and no ſecurity whatſoever was taken. Unleſs a republication took place after the contract, the will could not diſpoſe of this eſtate. Therefore this is a deſcended eſtate; and the claim of marſhalling is made againſt the heir. If there is a right to reſort to two funds, there is no difference, by what title, whether legal or equitable; and there are caſes of legacies charged upon land, which being paid out of the perſonal eſtate gave the common legatees a right upon the real eſtate: *Maſters* v. *Maſters* (*c*). The Court will ſtruggle againſt ſuch an accident as this. This teſtator had as much intention, that the legacies ſhould be paid, as to give the deviſed eſtates.

Mr. Romilly and Mr. Newbolt for the defendant the ſon—As to a general charge, it is impoſſible to imply ſuch an intention upon this will. Beſides, there is ſomething to ſatisfy the words "not therein before diſpoſed of:" *viz.* the direction, that the maintenance and education ſhall come out of the rents and profits, &c. The words relied on occur only upon the diſpoſition in the event of the ſon dying under twenty-one, and not having married before that age with conſent; and then the word "legacies" may be referred to the perſonal eſtate. But it might be the intention, that in that event theſe legacies ſhould be paid out of the accumulation: an intention not improbable, upon the ſuppoſition, that the real eſtate was to go to other perſons than his ſon: but it does not follow, that the teſtator intended that charge againſt his ſon.

The other queſtion is the only one of any difficulty. It is ſaid, this is a caſe of marſhalling againſt an heir, becauſe the contract for the purchaſe of this eſtate was made after the will: but can there be a doubt, that the codicil directing his executors to apply his perſonal eſtate in that purchaſe and to ſettle the purchaſed eſtate upon his heir at law is a diſpoſition to take effect? A teſtator may direct, that a thing may be purchaſed and given to a

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(*a*) 2 *Veſ.* 622. (*b*) 1 *Bro. C. C.* 420. (*c*) 1 *P. Will.* 421.

legatee: as in all caſes, where a legacy is ſaid to be of quantity, and not ſpecific. So he may direct ſtock to be purchaſed. This muſt therefore be conſidered marſhalling againſt a deviſee; and it is ſettled by many deciſions, that there can be no marſhalling as between a legatee and a ſpecific deviſee: *Cliſton* v. *Burt* (a). *Forreſter* v. *Lord Leigh* (b). Both are equally objects of bounty. This teſtator has expreſly directed his perſonal eſtate to be applied in purchaſing this real eſtate, to be ſettled on his ſon. I do not know, that the doctrine of marſhalling has ever been applied againſt an heir in a caſe of this kind. There is a material diſtinction between the common caſes of marſhalling by the equity of this Court and a caſe of this ſpecies: the teſtator looking forward to his ſituation as purchaſer of this eſtate, and directing the application between thoſe, who are to take. *Pollexfen* v. *Moore* is a very complicated caſe, and difficult to follow: but Lord *Hardwicke* ſeems to ſay, that equity ſubſiſts only between the vendor and vendee; and does not extend to a third perſon. The deciſion does not quite agree with that. The diſappointment of a legatee is a caſe, that always happens, where there is a diſpoſition of property without aſcertaining, what it is. It is impoſſible for the Court to go upon ſuch a ground.

Upon the face of the will there is no intention to charge the real eſtate with the legacies; and it is impoſſible to give the legatees a right to have this eſtate, ſpecifically directed to be purchaſed and ſettled, ſold again.

Mr. Mansfield in reply—It is objected, that the proviſion for the payment of the legacies out of any fund ariſing from the real eſtate is to be found only in one part of this will: but that ſhews, the teſtator thought, he had charged both funds. The expreſſion "after payment of legacies" ſuppoſes a precedent charge; and ſhews, the teſtator thought that fund liable to pay the legacies, though not expreſly charged by him. Though this direction as to the accumulation is expreſſed only in the event of the death of the ſon and the daughters taking the eſtate, the teſtator muſt be ſuppoſed to have the ſame intention as to all of them, that the accumulation ſhould be laid out in the ſame manner: that is, *minus* the legacies.

(a) 1 *P. Will.* 678.

(b) *Amb.* 171.

As to the other queſtion, it is ſaid, ſuch an equity has never been raiſed between a deviſee and a legatee. That is not the law of this Court. Where a mortgage upon a deviſed eſtate has been ſatisfied out of the perſonal eſtate, that ſhall not defeat a legacy (*a*). A mortgage conſtitutes a lien: a bond does not; and therefore there is a diſtinction. But there is no difference as to marſhalling between legal and equitable liens.

Nov. 20.

Lord CHANCELLOR ſtating the will delivered his opinion. There are three points: 1ſt, Whether the deficiency of the perſonal eſtate to anſwer the legacies is to be made good out of the fund ariſing from the accumulation of the real and perſonal eſtate: 2dly, Whether the legacies are charged upon the real eſtate: 3dly, If not, whether the legatees can ſtand in the place of the vendor of the eſtate, directed by the codicil to be purchaſed, in reſpect of his lien upon the eſtate for his purchaſe money.

Upon the queſtion, whether the legacies are charged upon the bulk of the real eſtate, it would be going farther than any of the caſes has yet gone, to ſay, that they are charged. Where a child would be unprovided for, one is afraid of the inclination to ſtruggle for that conſtruction; for it is ſtruggle: but no caſe has gone the length of determining, that words, which are capable of being otherwiſe ſatisfied, as theſe are, would amount to ſuch a charge by implication. I have a private perſuaſion, that the teſtator thought, theſe legacies were charged: but I cannot act upon it.

Upon the next queſtion, whether, ſuppoſing, the legacies are not charged upon the real eſtate, this purchaſed eſtate may by circuity be made anſwerable to the legacies, *Pollexfen* v. *Moore* is the only caſe cited: but without that authority I conſider it clearly ſettled, that the vendor has a lien for the purchaſe money, while the eſtate is in the hands of the vendee: I except the caſe, where upon the contract evidently that lien by implication was not intended to be reſerved. That is in equity very like a charge;

(*a*) *Oneal* v. *Mead*, 1 *P. Will.* 693. See 1 *P. Will.* 680. other caſes collected in Mr. Cox's note to *Clifton* v. *Burt*. *Hamilton* v. *Worley*, *ante*, vol. 2. 62. 3 *Bro. C. C.* 199.

and

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and the caſes of marſhalling ſeem to have gone this length; that, where there is a charge upon an eſtate deſcended, a legatee ſhall ſtand in the place of the perſon having that charge, reſorting to the perſonal eſtate; and I do not think a power to apply the perſonal eſtate, which is all that is given by this codicil, amounts to a command, leaving no diſcretion to the truſtees. There is a difficulty here from the circumſtance, that the eſtate purchaſed has not deſcended, but is deviſed; and there is a difference in marſhalling as to that. In this inſtance it is deviſed to the heir with many remainders over. It may be found difficult for the legatees by means of this circuity to find a fund for payment.

But I ſhall give no opinion upon that; for the ſavings being ſufficient with the bulk of the perſonal eſtate to pay the legacies, according to the true meaning of this will thoſe ſavings are the fund. In a caſe, that has not happened, it is quite clear, they are the fund: *viz.* the caſe of the ſon dying, before he takes the bulk of the ſavings. As to the daughters, one might live to take the fund two years after the death of the other, who might have attained the age of twenty-one, and have become entitled to the legacy. So both the daughters might die, before either became entitled to that fund of the ſavings; which in that caſe is given over to others. Upon the whole will I am of opinion, the teſtator meant the ſame in the caſe, that has happened, as in that clauſe; that whoever takes that fund ſhall take it ſubject to the legacies. The rents, and profits, intereſt and dividends, are made one joint fund for the maintenance; and if it is taken out of the perſonal eſtate, I muſt ſuppoſe, he meant, that if his daughters ſhould die, having attained the age of twenty-one, and received maintenance out of the perſonal eſtate, there muſt have been an account againſt the accumulation of the real eſtate, to apportion it; to the intent of reſerving the intereſt of the perſonal eſtate for the capital of the legacies. Though the ſame words "after payment of legacies" are not in the clauſe giving the ſavings to the ſon, as they are in thoſe giving them to the daughters, yet, attending to the other clauſe, and taking the three paſſages together, the legacies are to come out of that fund of the ſavings, if they are ſufficient; as they are.

Therefore declare accordingly: but I give no opinion, whether the legacies are a charge upon the real eſtate, or could be worked up to that effect by marſhalling.

TWOGOOD v. SWANSTON.

Nov. 21.

A bankrupt pending a Commiſſion has a right to an inſpection in reſpect of the ſurplus; and the Lord Chancellor will take care, that at the cloſe of it he ſhall have juſtice; but in this caſe the bankrupt was not permitted to ſurcharge and falſify in the Maſter's Office the accounts ſettled by the Commiſſioners long ago: though palpable errors ſpecifically pointed out by a ſhort petition would be rectified.

THIS cauſe aroſe out of the bankruptcy of *Mills*, *Warrington*, and *Swanſton*; the accounts in which were extremely complicated: but the reſult was a ſurplus after paying 20*s*. in the pound (*a*). *Swanſton*, the ſurviving bankrupt, being diſſatiſfied preſented a petition in the cauſe; the object of which was to be at liberty to ſurcharge and falſify the accounts; including thoſe ſettled by the Commiſſioners, before the bill was filed. The petition ſtated ſome errors; which were admitted.

Mr. Mansfield and Mr. Cox in ſupport of the petition ſaid, that the common practice of paſſing accounts before the Commiſſioners is for the aſſignees to prove them upon their oath merely: but the Commiſſioners do not examine into them, unleſs particular objections are pointed out.

Lord CHANCELLOR—In this caſe, as it frequently happens, it was neceſſary for the Lord Chancellor, ſitting in bankruptcy to call in aid his general juriſdiction. There is no doubt, that under the general direction of the ſtatutes relative to bankruptcy to take due order of the bankrupt's eſtate a duty ariſes to the bankrupt as well as to the creditors; not for the purpoſe of enabling him to haraſs them, but for the purpoſe of doing him juſtice, and particularly of informing him, what creditors have demands upon his eſtate; and the Chancellor muſt give him the benefit of an inſpection, and at his inſtance as well as that of the aſſignees. The intereſt of the creditors makes the account ſettled by the Commiſſioners an account of very high character; for they have

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(*a*) In conſequence of that intereſt was given upon ſuch debts as either upon the face of the ſecurity or by force of the contract carried intereſt. See *Ex parte Morris*, *ante*, vol. 1. 132. *Ex parte Champion*. *Ex parte Hankey*, 3 *Bro. C. C.* 436. 504. In *Ex parte Mills*, *ante*, 295. thoſe orders by Lord *Thurlow* were upon a rehearing affirmed by Lord *Roſslyn*.

an intereſt to ſhut out every one they can. But it does ſometimes happen, that there is a ſurplus to come to the bankrupt; and if that is foreſeen by the creditors, it is well known, they are quite indifferent beyond the 20 *s.* in the pound; and to ſay, the bankrupt is not to have an opportunity of examining in to ſuch queſtions, would be great injuſtice. Therefore pending the Commiſſion there might be many applications, that ought to be complied with by the Commiſſioners; and at the concluſion the Chancellor will fail in taking due order as to the bankrupt's eſtate, unleſs he has pending that adminiſtration ſecured at the cloſe of it the means of doing full juſtice to the bankrupt. If the bankrupt is not pending the Commiſſion to have an inſpection, that he may know, who is, and who is not, to be admitted a creditor, how is it poſſible, that he ſhould not at the cloſe of the concern? Otherwiſe it follows of neceſſity, that the aſſignees muſt pay dividends according to the order of the Commiſſioners, whether right, or improvidently made. If the bankrupt can at the cloſe of the Commiſſion ſhew, they were improvident, what is the Court to do? Is the aſſignee to be perſonally anſwerable, having paid under the order of the Commiſſioners? If ſuch a caſe could be raiſed againſt aſſignees, is it poſſible to raiſe ſuch a caſe againſt a ſurviving aſſignee? He repreſents the eſtate in all points, to which juſtice requires that he ſhould repreſent it: but if all of them paid theſe dividends wrongfully, is the bankrupt, or are the creditors, by a ſhort petition to eſtabliſh that equity only againſt the ſurviving aſſignee, and to make him pay all; taking his remedy, as he can, againſt the repreſentatives of thoſe, who are dead? As to errors in the account, the queſtion is not to be diſcuſſed againſt the ſurviving aſſignee alone, but in a caſe bringing all parties forward, and furniſhing queſtions of equity to be decided upon all the circumſtances. It cannot be got at in this way.

Then as to ſurcharging and falſifying, there is a clear diſtinction between the accounts previous and ſubſequent to 1789. The rule of the Court as to ſurcharging and falſifying certainly is to ſtate error enough upon the bill to ſhew, there is reaſon for it. He proves ſome of thoſe errors; and gets a decree. It is ſaid here, they have proved an error of 150 *l.*, another of 100 *l.*; and are likely to prove another as to 260 *l.* I paſs over another error;

as it is matter of the ſubſequent account, and matter of exception. That is the rule: but I muſt recollect this caſe; and looking at it as at the time of the bill filed, it was an account ſettled in the adminiſtration of bankruptcy, as to dividends paid; with regard to which it would be monſtrous to permit the bankrupt under theſe circumſtances to ſurcharge and falſify, or to charge the aſſignees. It is an account ſettled under the authority of the Chancellor, and in the view of the Commiſſioners; and it is proved by affidavit, that to a certain degree *Swanſton* had an intercourſe with the eſtate during the Commiſſion. I do not ſay, palpable errors are not to be ſet right: but for the benefit of all parties I will not let them go into the Maſter's Office for the chance of finding errors. The Maſter would be trying queſtions upon a great number of items, which he would not be intended by the Chancellor to try. Therefore, the party undertaking, that *Swanſton* ſhall have credit for theſe ſums, there is no reaſon to ſend it to the Maſter at all; for all the reſt is open to exception: but if *Swanſton* can by a ſhort petition ſtate, what items ought to be expunged upon clear grounds, I do not ſay, I would not hear him: but it is not right with regard to his aſſignee, if after having paſſed his accounts in this way before the Commiſſioners, I ſhould ſend him to an account to the extent, to which that obtains in the Maſter's Office. I ſhall give no coſts in ſuch a caſe. I think it quite enough merely to give permiſſion to make an application to the Court, as to ſuch items as he can ſpecifically point out.

The petition was diſmiſſed upon an undertaking to give up the ſum of 105 *l.*, &c. admitted to be errors, and ſubject exceptions as to the ſubſequent account.

Nov. 21.

ANGERSTEIN *v.* HUNT.

Upon breach of an injunction reſtraining an act the proper courſe is perſonal ſervice of notice of motion, that the defendant ſhall ſtand committed: not the practice to move, that he ſhall ſhew cauſe, why he ſhall not ſtand committed.

PREVIOUSLY to the vacation an injunction had been granted to reſtrain the defendant from ploughing up a rabbet-warren farther than was neceſſary for the ſuſtenance of the rabbets.

Mr. Romilly for the plaintiff moved, that the defendant ſhould ſhew cauſe, why he ſhould not ſtand committed for breach of the injunction; upon affidavits, that he had ploughed up thirty acres; and was proceeding farther.

Where the injunction is to do a thing the courſe is to move, that he ſhall do it by a particular day, or ſtand committed.

Lord CHANCELLOR—It is not the practice in this Court for a man to ſhew cauſe, why he ſhould not ſtand committed. The motion ought to be, that he ſhall ſtand committed for breach of the injunction; and it ought to be made upon perſonal ſervice upon him, that the Court will be moved for that purpoſe. Where the injunction is to do a thing, the courſe is to move for an order, that he ſhall do it by a particular day, or ſtand committed. But this is not to do a thing. The proper mode therefore will be to ſerve him with notice, that the Court will be moved, that he ſhall ſtand committed.

Rolls.
Nov. 11. 17. 23.

CAFFREY *v.* DARBY.

Truſtees charged with a loſs occaſioned by their negligence, though without any corrupt motive. The coſts followed of courſe.

JAMES CAFFREY, being poſſeſſed of a public houſe in *St. Giles*'s, as aſſignee of a leaſe for twenty-five years from *Lady Day* 1786 at the yearly rent of 60*l.*, died; having by his will bequeathed to his wife all and every thing he was then poſſeſſed of, and all monies due to him for the ſole uſe of his wife and children. Adminiſtration with the will annexed was granted to his widow; who took poſſeſſion of the ſtock in trade, and carried on the buſineſs.

By indentures, dated the 11th of *July* 1789, reciting, that *Ann Caffrey* was deſirous of making a proviſion for her four children to the extent of the property, which her late huſband died poſſeſſed of; that a marriage was agreed on between her and *Peter Prieſt;* and in order to ſecure the proviſion intended it was agreed, that the leaſe, the ſtock in trade, and effects and houſehold goods, which *Ann Caffrey* was then in poſſeſſion of, and which were the property of her late huſband, ſhould be aſſigned and made over to *John Darby* and *William Bedells; Ann Caffrey* with the conſent of *Prieſt* aſſigned all her eſtate in the premiſes, with the leaſe, and all the ſtock in trade, houſehold goods, and all other goods and chattels, the property of her late huſband, to *Darby* and *Bedells*, their executors, *&c.*; upon truſt, that they ſhould ſtand poſſeſſed thereof as a ſecurity for raiſing the ſum of 800*l.*; to be applied and diſpoſed of, as after mentioned: that is to ſay: as ſoon as ſaid 800*l.* or any part thereof ſhould be raiſed by ſale of ſaid premiſes or ſome part thereof, or by the payment of *Prieſt* to the truſtees, the ſame were to be from time to time inveſted in the public funds or upon mortgage, the ſecurity to be approved by the truſtees, or the ſurvivor, his executors, *&c.* in their names; upon truſt, that they, *Darby* and *Bedells*, and the ſurvivor, *&c.* ſhould receive the dividends or intereſt ariſing from ſaid 800*l.* or ſo much thereof as ſhould from time to time be inveſted, as aforeſaid; and after the receipt thereof pay the ſame into the hands of the ſaid *Ann* for and during her natural life, to and for her ſole uſe and benefit; whoſe receipts alone notwithſtanding her coverture ſhould from time to time be good and ſufficient diſcharges; to the intent, that the ſame ſhould not be at the diſpoſal of or ſubject or liable to the controul, debts, forfeitures, or engagements of ſaid *Peter Prieſt* or any after taken huſband, but only at her own ſeparate diſpoſal; and from and after the raiſing and inveſting ſaid 800*l.*, as aforeſaid, then upon truſt to transfer ſaid premiſes unto *Peter Prieſt*, his executors, *&c.*, for his own benefit; and as to the ſaid 800*l.* ſo to be raiſed and inveſted, as aforeſaid, from and after the deceaſe of ſaid *Ann* upon farther truſt, that the truſtees ſhould pay the intereſt and produce of ſaid 800*l.* or ſuch part thereof as ſhould be inveſted, as aforeſaid, in and about the maintenance and education of her ſaid children in ſuch manner as the truſtees ſhould think moſt proper, until *James Caffrey* ſhould attain the age of twenty-one, and *Ann, Catherine*, and *Elizabeth, Caffrey*, ſhould attain that age, or be married; and then that they, the truſtees, ſhould pay and transfer ſaid 800*l.* or ſo much thereof as ſhould be ſo inveſted, as aforeſaid, to and among the ſaid children in equal ſhares and proportions, to the ſon at the age of twenty-one, and to the daughters at that age or marriage, which ſhould firſt happen; with a proviſion for ſurvivorſhip among them in the events ſpecified; and if all of them ſhould die in the lifetime of their mother without leaving iſſue, then upon truſt to pay or transfer the ſame unto *Peter Prieſt*, his executors, *&c.*: Provided, that ſo long as *Peter Prieſt* or his aſſigns ſhould pay into the hands of the truſtees not leſs than 100*l.* a year, which was to be inveſted in Government or other good ſecurities upon the truſts aforeſaid in part of ſaid 800*l.*, ſo agreed to be inveſted, until the whole of ſaid 800*l.* ſhould be inveſted upon the truſts and for the purpoſes aforeſaid, it ſhould be lawful for ſaid *Peter Prieſt* to poſſeſs, occupy and enjoy, ſaid premiſes thereby aſſigned, and to make uſe of the ſtock in trade, houſehold goods, and effects; ſo that a ſtock of equal worth of ſaid *Peter Prieſt* was kept up; which together with the other eſtate would be ſufficient to anſwer ſaid 800*l.* or ſuch part thereof as might not be inveſted upon the truſts aforeſaid.

The marriage took place ſoon afterwards; and *Prieſt* took poſſeſſion of the houſe, ſtock in trade, furniture, and effects, mentioned in the indentures; and continued to carry on the buſineſs from *July* 1789 till the 11th of *July* 1797. *Darby* had received from him on the 28th of *June* 1791 on account of the truſts of the ſettlement 100*l.* by different payments; and on the 19th of *May* 1792 the farther ſum of 100*l.* alſo by different payments; and on the 30th of *July* 1793 50*l.* more; which ſum of 250*l.* was the whole, that was received on account of the truſt. In 1797 *Prieſt* became inſolvent; and on the 9th of *July* 1797, being two days before the laſt inſtalment ought to have been paid, the truſtees took poſſeſſion; and on the next day *Prieſt* abſconded; and a commiſſion of bankruptcy ſoon afterwards iſſued againſt him. The aſſignee under the commiſſion diſputing the right of the truſtees, it was agreed, that the premiſes ſhould be ſold without prejudice. The truſtees accordingly proceeded to a ſale of the houſe; which produced 405*l.* The aſſignee under the commiſſion received 445*l.* 18*s.* by the ſale of the houſehold goods, fixtures, and ſtock in trade; and the houſehold goods and fixtures having been valued at 276*l.* 12*s.* 6*d.*, the truſtees brought an action againſt the aſſignee for ſo much of that ſum as would with the other ſums received by them on account of the truſt make up the ſum of 800*l.* Under that action all matters in queſtion between the parties were referred to arbitration; and the arbitrator by his award, dated the 1ſt of *November* 1798, decided, that the plaintiffs at law had no cauſe of action. On the 3d of *November* the firſt and final dividend of 8*s.* in the pound was made under the Commiſſion: but the truſtees made no claim. The bankrupt obtained his certificate.

In *Michaelmas* Term the truſtees applied to the Court of *King's Bench* by motion to ſet aſide the award; which motion was refuſed (*a*).

The bill was filed on behalf of the children; praying, that the truſtees may be decreed to transfer the ſtock purchaſed with the truſt fund to the Accountant General, an account of what they had received under the truſt; and that they may be charged with the deficiency.

The truſtees by their anſwer ſtated, that between *July* 1793 and *July* 1797 they at various times applied to *Prieſt* and his wife to make farther payments: but they alleged, that from the preſſure of the times, which had conſiderably decreaſed their buſineſs, they were not able from their profits to make the payments according to the ſettlement; but that although they were not making a profit ſo as to make farther payments, yet they maintained, cloathed, and educated, the plaintiffs; and were not incurring any debt; nor taking any other than the uſual credit to carry on their buſineſs; and the defendants always underſtood from them, that the perſons they dealt with were acquainted with the ſettlement; and the defendant *Ann Prieſt* frequently deſired the defendants not to purſue any adverſe meaſures; for it would be the ruin of herſelf and her children, were they compelled to quit the houſe and buſineſs; as the plaintiffs were maintained and educated out of the profits of the buſineſs.

The anſwer farther ſtated, that *Peter Prieſt* aſſigned as a farther reaſon for not being able to make farther payments, that he had

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(*a*) *Darby v. Smith*, 8 *Term Rep. B. R.* 82.

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1801. CAFFREY *v.* DARBY.

been impoſed upon by his wife as to the property; being obliged to pay a debt of 145 *l.* with which he was unacquainted at the date of the ſettlement.

The defendants ſubmitted, that the legality of the award ſtill remains open; and that it is bad upon the face of it; proceeding upon the ground of the ſtatute 21ſt *Jam.* 1. *c.* 19. *ſ.* 10. & 11. operating upon the property; and that being adviſed, that the award had proceeded upon a miſtake of the law, and was therefore illegal, they did not conceive themſelves entitled to prove any debt under the Commiſſion; and therefore did not apply; and between the date of the award and the dividend they had no opportunity of applying to ſet aſide the award. They ſtated, that they had no fraudulent intention; and acted to the beſt of their judgment; and they claimed to be allowed the coſts they paid under the award, the expences of the ſale; and *Darby*, who was the attorney, who had adviſed and prepared the ſettlement, claimed the amount of his bill on that account.

Mr. Piggott, Mr. Romilly, and Mr. Wynne, for the plaintiffs, and Mr. Wingfield for the aſſignees of the bankrupt, defendants, in the ſame intereſt, admitted, that the truſtees had no bad motive; but inſiſted, that they muſt be anſwerable for the loſs to the truſt fund.

Mr. Richards and Mr. Cooke for the defendants, the truſtees—The fair intention of theſe truſtees is admitted; that they were not influenced by any corruption or motive of gain to themſelves. The Court will therefore feel ſatisfaction, if they can avoid making a decree againſt them. It would be a deciſion of great importance; that truſtees without any benefit are to be made anſwerable, when they have conducted themſelves to the beſt of their judgment in the fair execution of their truſt. The nature of the ſubject of this truſt, the buſineſs of a public houſe, muſt be conſidered. It would have been a breach of truſt in them to have ſold the property upon failure of payment of the inſtalments. This was in the nature of a mortgage certainly. Is the truſtee of a mortgage, neglecting to enter upon a failure of paying the intereſt, to be liable, merely becauſe by an accident the property is deſtroyed, as by a ſuperior title? Theſe truſtees acted *bonâ fide*;

having nothing in view but the good of the family; and during part of the time it was for the good of the family; and the loſs aroſe by act of law, a bankruptcy. In ſuch a caſe truſtees have never been charged as for wilful default. Suppoſing the point of law was doubtful, they cannot be charged for not knowing it. Opinions were given in their favour upon that point. It was certainly a queſtion of conſiderable doubt. If they had not permitted the huſband to uſe the property, they would have acted directly againſt the ſpirit, though according to the letter, of their truſt. This caſe is analogous to that of truſtees putting money in the hands of a banker. A fair and honourable diſcretion was exerciſed according to the very ſpirit of the deed. The deciſion of the arbitrators and of the Court of *King's Bench* is very capable of being reſiſted; and it may very well be argued, that this caſe does not fall within the ſtatute of *James* 1ſt (*a*). The caſe in the *King's Bench* met with little argument; and may be conſidered a haſty deciſion. *Ex parte Marſh* (*b*) and *Viner* v. *Cadell* (*c*) are againſt it. They had no time between the date of the award and the dividend to make a claim under the Commiſſion; and their claim, if they had made it, could not have been admitted; for claiming the goods themſelves they could not have been admitted to prove a debt. The plaintiffs are ſtill entitled to follow the property in the hands of the aſſignees; who muſt ſtand in the ſituation of the bankrupt. But they were in fact aware of the ſettlement and the claims under it.

As to the deductions claimed by the truſtees, they are clearly entitled to their expences, the coſts of the action, though unſucceſsful; unleſs it could be ſhewn, that it was wantonly brought. If the Court goes the length now deſired, it will add another difficulty to thoſe, which make it almoſt impoſſible to procure truſtees to act.

Mr. Piggott in reply—*Viner* v. *Cadell* is unqueſtionably right; and clearly diſtinguiſhable from the determination in the Court of *King's Bench* upon this caſe. There was no tranſaction changing the property. Theſe arrears were very conſiderable in ſo ſhort a time. I admit, there was no corrupt motive: but are truſtees

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(*a*) 21 *Jam.* 1. *c.* 19. *ſ.* 10, 11. (*b*) 1 *Atk.* 158. (*c*) 3 *Eſp.* 88.

1801. CAFFREY v. DARBY. for infants to permit arrears to accrue for a length of time? Can it grow better? What is called an accident muſt have been foreſeen as an inevitable conſequence of permitting him to be in arrear, and that arrear increaſing. I admit, when the event, the bankruptcy, happened, they did the beſt they could in the ſituation, in which they had placed the property.

Nov. 23. *The Maſter of the Rolls*—The queſtion is, whether the loſs ariſing from the deficiency of this truſt fund is to be borne by the infants, or to be made good by the truſtees. The caſe ariſes upon a conveyance from *Ann Caffrey* to the truſtees: but the real tranſaction was a ſale of this property to the huſband for 800*l.*, payable by inſtalments; the laſt inſtalment payable in 1797. It appears, the whole of the property ſold for more than 800*l.*: but as it was found, the truſtees were not entitled to the ſum, for which the furniture and other effects ſold, the deficiency is conſiderable. It is contended for the truſtees, that though undoubtedly there was originally property ſufficient to anſwer the 800*l.*, and though a loſs has now taken place, ſo that they cannot receive the amount in value of that property, it was loſt by means, for which under the circumſtances they are not reſponſible. Firſt, it is obvious, they ſay, it could not be intended, they ſhould proceed rigorouſly to enforce payment of each ſum of 100*l.*, as it became due; for ſo long as the ſecurity they had taken remained good the 800*l.* would be forthcoming; and they had only to look to that: the wife was to look to the intereſt. It was therefore in nature of a mortgage; and, as in the common caſe, it is not to be expected, that they were to have inforced it at the preciſe day; that it would have been diſadvantageous to the children themſelves to have proceeded rigorouſly year by year to inforce payment of the inſtalments; for the children were maintained by him. There is alſo ſome evidence of intreaties by the wife, that her huſband might not be preſſed. Then they ſay, it appears, that by their delay in getting in the money no loſs has been ſuſtained; for the loſs was not occaſioned by that; and but for the deciſion in the Court of *King's Bench* the property would have been ultimately ſufficient for the purpoſes of the truſt; and the loſs was occaſioned by the deciſion of a very doubtful queſtion of law; and it is hard to make them reſponſible for that.

On the other hand it is to be conſidered, that this was money payable by inſtalments; not a ſum to be paid at once, as a mortgage is; and ſecured too, partly, upon an eſtate daily diminiſhing in value: a ſhort leaſe, for twenty-five years, commencing in 1786; alſo upon a ſort of property very uncertain in its nature; for it muſt be entirely in the cuſtody of the perſon having the poſſeſſion of the houſe, furniture, *&c.* From theſe two conſiderations, the diminiſhing value of the property, and the mode of payment by inſtalments, I am of opinion, the truſtees were not juſtified in any great indulgence: the perſon, if not poſitively bound, holding the property under a condition; for it was evident, that his inability would be conſtantly augmenting. If he was unable to pay the firſt inſtalment, he muſt be ſtill leſs able to pay the ſums accumulated from permitting them to run together. The caſes of payment by inſtalments and at once are quite different. In the latter the debtor may be able to pay that ſum tomorrow, or next year: but the chance of receiving money by inſtalments depends upon its being regularly received. Therefore, even though the truſtees might not have been under the neceſſity of exacting from the huſband the money on the preciſe day, yet they ought not to have given great latitude. They were hardly juſtifiable in permitting two inſtalments to become due; ſtill leſs three; ſtill leſs four. But here, they permit him to remain four years in poſſeſſion without receiving a ſhilling. That is evidence, that he was not proſperous. It did not turn out as well as he expected. It might be ſuppoſed, that he was running in debt with other people. The truſtees might have expected a controverſy with the creditors. They ought therefore to have taken ſome ſtep for the ſecurity of the infants; particularly when that is combined with the other circumſtance, that the property was diminiſhing in value. Notwithſtanding the leaſe ſold at laſt for not much leſs than he was to pay, it was property naturally diminiſhing in value; and as to the reſt of the truſt property the ſecurity was of very little value.

It would be very dangerous, though no fraud could be imputed to the truſtees, and no kind of intereſt or benefit to themſelves was looked to, to lay down this principle; that truſtees might without any reſponſibility act, as theſe did; in eight years, within which time the whole money ought to have been paid, receiving only 250 *l.*; and taking no ſtep as to the remainder. It would be an encouragement to bad motives; and it may be impoſſible to detect undue motives. If we get the length of neglect in not recovering this money by taking poſſeſſion of the property, will they be relieved from that by the circumſtance, that the loſs has ultimately happened by ſomething, that is not a direct and immediate conſequence of their negligence; *viz.* the deciſion of a doubtful queſtion of law? Even ſuppoſing, they are right in ſaying, this was a very doubtful queſtion, and they could not look to the poſſibility of its being ſo decided, yet, if they have been already guilty of negligence, they muſt be reſponſible for any loſs in any way to that property; for whatever may be the immediate cauſe, the property would not have been in a ſituation to ſuſtain that loſs, if it had not been for their negligence. If they had taken poſſeſſion of the property, it would not have been in his poſſeſſion. If the loſs had happened by fire, lightning, or any other accident, that would not be an excuſe for them, if guilty of previous negligence. That was their fault.

Property poſſeſſed by a bankrupt in *auter droit* is not within the Stat. 21 *Jam.* 1. c. 19. *ſ.* 10, 11.

The queſtion at law was treated as an extremely nice queſtion at the bar; and the caſe as an unlooked for deciſion. I do not ſee, how the queſtion could have received a different deciſion. The caſe is very different from thoſe, which were cited: *Ex parte Marſh* and *Viner* v. *Cadell*. In each of thoſe caſes the widow having the huſband's property in her poſſeſſion, the ſecond huſband as ſuch fell into the poſſeſſion of that property, of which the wife had the poſſeſſion. That is a poſſeſſion in *auter droit* merely. There was no room for a contrary deciſion without holding, that there can be no ſuch thing as a poſſeſſion in *auter droit* without making the property liable under the ſtatute. There was no fault in any perſon in leaving the property in that poſſeſſion, in which it ought not to be. But in this caſe there is an aſſignment by the adminiſtratrix to the truſtees; veſting in them the legal property. The truſtees give the poſſeſſion to *Prieſt*. He was entitled to the poſſeſſion by the terms of the truſt deed, under the proviſo, ſo long as he continued to pay the 100 *l.* a year. He poſſeſſed not in *auter droit*, but in his own right, under, and according to, this deed. The inſtant he failed to pay the 100 *l.* a year regularly they were entitled that inſtant to take the poſſeſſion from him. They leave it with him, juſt as if he had made thoſe payments. As to all the reſt of the world the truſtees took upon them the reſponſibility; dealing, as if he had paid them. It is directly within the act; leaving in his poſſeſſion goods, which they might have taken any day out of his poſſeſſion. The deciſion in the Court of *King's Bench* is perfectly right; and it is impoſſible, that there could be any other deciſion: but if it was wrong, that would not have altered the determination here; for, as between the truſtees and the bankrupt's eſtate the queſtion is decided and at reſt; and is not to be overhauled here.

The decree therefore muſt be for an account according to the prayer of the bill; and if there is any deficiency, the truſtees muſt make it good.

As to the allowances claimed by the truſtees, even if they are compelled to make good the loſs, particularly the coſts of the ſuit with the aſſignees, it is a neceſſary conſequence of the deciſion, that no coſts can be given to them; for the ſuit was made neceſſary by their laches; and therefore cannot poſſibly be at the expence of the fund. They were taking the chance of eſcaping from the effect of their own negligence. They muſt bear the whole expence of that ſuit. As to the expence of the ſale of the leaſe, which it is alleged, muſt have been incurred at all events, that depends upon the reſult of the account; for if they neglect to ſell, till the property is diminiſhed in value, and if otherwiſe it would have produced enough both for the 800 *l.* and the expences of the ſale, then they are not entitled; for the deficiency was the conſequence of their laches. If any expence was incurred in the execution of their truſt, they will be entitled to that. The coſts of the cauſe muſt of courſe be given againſt them.

Nov. 27.

WILLS *v.* SLADE.

No objection to a partition, that other perſons may come *in eſſe* and be entitled.

ELIZABETH WILLS being entitled to the reverſion or remainder in fee of an undivided moiety of a capital meſſuage and four ſmall meſſuages, ſubject to the life eſtates of herſelf and her huſband, and ſon-in-law *Richard Wills*, and having a power to deviſe notwithſtanding coverture, by her will deviſed all the meſſuages, tenements, moieties, lands, hereditaments, and premiſes, with their appurtenances, ſo limited, from and after the deceaſe of *Richard Wills* unto all and every the child and children of the body of *Richard Wills*, lawfully to be begotten, equally to be divided between them, part and ſhare alike, as tenants in common, and not as joint-tenants, and to the ſeveral and reſpective heirs of the body and bodies of all ſuch child and children reſpectively lawfully iſſuing; and if there ſhould be more ſuch children than one, and one or more ſhould die without iſſue of his, her, or their, body or bodies, then and ſo often as to the part or parts of ſuch child or children ſo dying without iſſue ſhe willed, that the ſame ſhould remain to the uſe of the ſurvivors or ſurvivor of them as tenants in common, and to the heirs of the body of ſuch ſurvivors or ſurvivor; with a deviſe over in default of ſuch iſſue to a nephew in fee.

After the death of *Elizabeth Wills* the bill was filed for a partition by *Richard Wills* and his four infant children againſt the deviſees of the perſon entitled to the other undivided moiety; who had been in poſſeſſion of the manſion houſe; and alſo upon the death of their deviſor entered into poſſeſſion of all the reſt.

Mr. Sutton and Mr. Steele for the plaintiffs ſaid, an objection had been taken from the poſſibility of other children.

Mr. Richards for the defendant ſaid, all parties were willing to have a partition, if it could be made.

Lord CHANCELLOR—At all events you are entitled to a partition during the life of the tenant for life. But I think, this is no objection; for if ſo, in every caſe, where there is a ſettled eſtate with remainders to perſons, who may come *in eſſe*, there never can be a partition.

The decree was made for an account and a Commiſſion for partition between the plaintiffs and defendants according to the prayer of the bill.

HOPE *v.* LORD CLIFDEN.

Nov. 27.

Portion veſted in the caſe of parent and child by implication from the whole ſettlement, againſt expreſs words; and a clauſe of ſurvivorſhip upon the death of a child, before the portion ſhould become payable, was upon the authorities conſtrued, before it ſhould be veſted.

By indentures of leaſe and releaſe, dated the 3d and 4th of *March* 1739, previous to the marriage of *Eliab Breton* and *Elizabeth Wolſtoneholme*, in conſideration of the marriage and of a ſettlement of the ſame date by *Elizabeth Wolſtoneholme* of her eſtate of inheritance for the benefit of *Eliab Breton* and the iſſue of the marriage, and for other conſiderations, certain real eſtates in the county of *Northampton* were conveyed to truſtees and their heirs; to the intent, that *Mary Breton*, the mother of *Eliab Breton*, ſhould receive a rent-charge of 400 *l.*, ſecured by a term of 99 years upon part of the ſaid premiſes; and, ſubject thereto, to the uſe of *Eliab Breton* for life; remainder to truſtees to preſerve contingent remainders; remainder to truſtees for 150 years for ſecuring a jointure of 300*l.* a year to *Elizabeth Wolſtoneholme* in bar of dower; and ſubject thereto to the uſe of truſtees, their executors, &c. for a term of 500 years; remainder to the firſt and other ſons of the marriage in tail male; remainder to *Eliab Breton*, his heirs and aſſigns for ever.

The truſts of the term of 500 years were declared to be, in caſe there ſhall be any child or children of the ſaid *Eliab Breton* on the body of the ſaid *Elizabeth Wolſtoneholme* his intended wife to be begotten living at the time of the deceaſe of the ſaid *Eliab Breton* or afterwards born alive other than ſuch as ſhall be heir male of his body for the time being, then the ſaid truſtees, their executors, &c. ſhall and do after the deceaſe of the ſaid *Eliab Breton*, but ſubject nevertheleſs and without prejudice to the ſaid ſeveral annuities or yearly rent charge of 400 *l.* and

300 *l.* by ſale or mortgage of the ſaid premiſes compriſed in the ſaid term of 500 years or of a competent part thereof for all or any part of the ſaid term, or by or out of the rents, iſſues, and profits, thereof in the mean time until ſuch ſale or mortgage can be made, or by all or any the ways and means aforeſaid, raiſe and levy the ſum of 5,000 *l.* of lawful money of *Great Britain* for the portion and portions of all and every the child and children of the ſaid intended marriage other than and except an eldeſt or only ſon; to be applied and diſpoſed of in manner following: in caſe there ſhall be but one ſuch child, then ſuch child ſhall have the whole ſum of 5,000 *l.* for his or her portion; and in caſe there ſhall be two or more ſuch children, then the ſaid ſum of 5,000 *l.* to be equally divided between or amongſt them ſhare and ſhare alike: the portion or portions of ſuch of them as ſhall be a ſon or ſons to be paid to him or them at his or their reſpective age or ages of twenty-one years; and the portion and portions of ſuch of them as ſhall be a daughter or daughters to be paid to her or them at her or their reſpective age or ages of twenty-one years or day or days of her or their reſpective marriages which ſhall firſt and next happen after the deceaſe of the ſaid *Eliab Breton*; and if any of the ſaid youngeſt ſons ſhall attain the age of twenty-one years, or any of the ſaid daughters ſhall attain the age of twenty-one years or be married in the lifetime of the ſaid *Eliab Breton*, then the portion and portions of ſuch of them as ſhall be a daughter or daughters, younger ſon or younger ſons, ſhall be paid to him, her, and them, within three months next after the deceaſe of the ſaid *Eliab Breton*, unleſs the ſaid *Eliab Breton* ſhall by any writing or writings under his hand and ſeal direct the ſame to be raiſed in his life, which it is hereby agreed and declared it ſhall and may be lawful for him to direct or appoint accordingly; ſo as the ſame be no prejudice to the ſaid ſeveral rent charge of 400 *l.* and 300 *l.* ſo limited to the ſaid *Mary Breton* and *Elizabeth Wolſtoneholme*, as aforeſaid, or either of them. And alſo upon this further truſt; that in the mean time from and after the deceaſe of the ſaid *Elizabeth Breton*, until the ſame portion or portions ſhall become payable, they the ſaid truſtees, their executors, &c. ſhall and do by and out of the rents, iſſues and profits, of the premiſes ſo limited to them for the ſaid term of 500 years, as aforeſaid, but ſubject nevertheleſs and without prejudice to the ſaid ſeveral rent charge of 400 *l.* and 300 *l.*,

raiſe, levy, and pay, ſuch yearly ſum and ſums of money for the maintenance and education of the child and children of the ſaid intended marriage entitled to portions under the truſts of the ſaid term, until their ſaid portion or portions ſhall become payable, as are herein after mentioned (that is to ſay): in caſe there be but one ſuch child, the yearly ſum of fifty pounds, till he or ſhe ſhall attain the age of twelve years; and from and after that age, and until his or her portion ſhall become payable, the yearly ſum of one hundred pounds; and if there ſhall be two ſuch children, the yearly ſum of forty pounds for each of them, till they ſhall reſpectively attain their reſpective ages of twelve years; and from and after their reſpective ages of twelve years the yearly ſum of 80*l.* a piece; and if there ſhall be three or more of ſuch children, ſuch yearly ſum for each of them, until their reſpective portions ſhall become payable, as will amount unto and be equal with the intereſt of their reſpective portions after the rate of four pounds *per centum per annum*: the ſaid yearly ſum or ſums for maintenance to be paid at or on the feaſts of *Saint Michael* the archangel, and the annunciation of the bleſſed virgin *Mary* in every year by even and equal portions; the firſt payment thereof to begin and be made at or on ſuch of the ſaid feaſts as ſhall firſt and next happen after the deceaſe of the ſaid *Eliab Breton*; Provided nevertheleſs, and it is hereby agreed and declared, that if any of the ſaid children of the ſaid intended marriage entitled to the portions under the truſts of the ſaid term of five hundred years ſhall happen to die, or become an eldeſt or only ſon, before his, her, or their portion or portions ſhall become payable, then the portion and portions of him, her or them, ſo dying or becoming an eldeſt or only ſon, ſhall go, accrue and be paid, unto the ſurvivors and ſurvivor and others and other of them, when his, her or their, original portion or portions ſhall become payable by virtue of theſe preſents: Provided alſo, that in caſe all the children of the ſaid marriage entitled to portions under the truſt of the ſaid term of five hundred years ſhall die, before any of their ſaid portions ſhall become payable, then the ſaid ſum and ſums of money ſo to be raiſed for ſuch child and children, or ſo much thereof as ſhall not then be raiſed, ſhall not be raiſed, but ſhall ceaſe for the benefit of the perſon and perſons entitled to the reverſion or remainder of the premiſes immediately expectant on the determination of the ſaid term of five hundred years; and then alſo ſuch ſum and ſums of money as ſhall be then raiſed for or towards ſuch portion or portions, as aforeſaid, ſhall be paid unto the ſame perſon and perſons ſo next in reverſion or remainder as aforeſaid.

The indentures alſo contained a proviſo, that, if *Eliab Breton* ſhould in his lifetime ſettle, give or advance, unto, for, or upon, any of the children entitled to portions any ſum or ſums of money, lands, tenements, goods, or chattels, for and towards their advancement, preferment in marriage or otherwiſe, then ſuch ſums of money, or the value of ſuch lands, tenements, goods, and chattels, to be received by, given to, or ſettled upon, ſuch children, ſhould be accounted as part, if leſs, or, if as much or more, for the whole, of the portions provided for them, as aforeſaid; unleſs the ſaid *Eliab Breton* ſhould by writing under his hand and ſeal ſignify the contrary.

The iſſue of this marriage was four children: three ſons; *Michael Harvey*, *William*, and *Eliab*, and one daughter, *Mary*. The daughter attained the age of twenty-one in the life of her father; and married *John Hope*; by whom ſhe had three ſons. *Mary Hope* died in the life of her father; who died in *December* 1785; leaving his wife and three ſons ſurviving. *Michael Harvey Breton*, who had been in poſſeſſion of the eſtates ſince the death of his father, died in 1798; leaving a ſon; and *Mary Breton* and *Elizabeth Breton*, the mother and widow of *Eliab Breton*, had been dead ſeveral years.

The bill was filed by the eldeſt ſon and adminiſtrator of *Mary Hope*; ſtating, that ſhe had not been advanced by her father; and that her brothers *William* and *Eliab* had been advanced by their father to a greater amount than their ſhares of the ſum of 5,000 *l.*; and had executed releaſes to their brother *Michael Harvey*; and praying an account of what is due in reſpect of one-third of the ſaid ſum of 5,000 *l.*; and that what ſhall appear due may be raiſed under the term.

The defendant *William Breton*, the ſon and heir of *Michael Harvey Breton*, by his anſwer ſubmitted, that the ſum of 5,000 *l.* did not become a veſted intereſt in any of the children of *Eliab* and *Elizabeth Breton* during the life of their father; and *Mary*

Hope having died in his life, the plaintiff is not entitled to have any part of the ſaid ſum raiſed.

Mr. Manſfield, Mr. Romilly, and Mr. Bell, for the plaintiff—The ſingle queſtion is, whether Mrs. *Hope*, who attained the age of twenty-one, and married, loſt her portion by dying in the life of her father. The eſtabliſhed doctrine of this Court is, that, if portions are directed to be paid at the age of twenty-one or the marriage of daughters, with ſurvivorſhip, followed by a proviſion, that if they attain thoſe periods in the life of the father, the portions ſhall not be paid till after his death, yet that clauſe ſhall not prevent the veſting in his life. That is now become the ſtanding rule upon *Emperor* v. *Rolfe* (*a*); *Cholmondeley* v. *Meyrick* (*b*), and *Willis* v. *Willis* (*c*), expreſsly recogniſing the preceding caſes. Upon thoſe authorities it is now fully ſettled, that where the time of payment is not, as is ſaid in many caſes, annexed to the ſubſtance, and is mentioned, not on account of the perſon, but the eſtate, the portion is veſted. In this caſe two periods are pointed out, the age of twenty-one and marriage, both clearly referring to the perſon: the third period, the death of the father, is mentioned with regard to the fund. The words, that will be principally relied on, are thoſe, that occur in the beginning of the declaration of the truſts of the term; upon which it will be contended, that it was not the intention, that this portion ſhould be raiſed but for children ſurviving their father. The caſe ſo provided for has not happened; for by an expreſs direction the truſts were not to be performed, if there were no children living at his death: but there were children. Therefore they can only raiſe an inference from thoſe words; providing for raiſing the portions, in caſe there ſhall be any child or children "living at the time of the "deceaſe of the ſaid *Eliab Breton* or afterwards born alive," &c. That expreſſion upon the whole ſettlement muſt be a mere miſtake; and it muſt have been intended children born in his life, or in due time afterwards. Theſe words muſt have been uſed by accident. There never was ſuch a ſettlement as they import; that as long as the father lived, there ſhould be no proviſion for the children; and no portions, unleſs they ſhould happen to ſurvive their father; though they ſhould marry and have children and grand-

(*a*) 1 *Veſ.* 208. (*b*) 3 *Bro. C. C.* 253 *n.* (*c*) *Ante*, vol. 3. 51.

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children. But even upon thoſe words, taken ſtrictly, the conſtruction can only be, that the portions were not to be raiſed, if there were no children then living. Mrs. *Hope* having married in the life of her father, the event, upon which the ſurvivorſhip accrues, did not according to the caſes decided happen. In *Woodcock* v. *The Duke of Dorſet* (*a*) the expreſſion is, if they "ſhould "leave at the death of the ſurvivor any child or children;" and yet it was decided, that Lady *Thanet*, though ſhe died in the life of her mother, was entitled to a ſhare. The intention was not ſtronger than upon this ſettlement; though depending upon different circumſtances; for it cannot be conceived, the intention was, that if a child wanted a portion, having a family, that family ſhould be deprived of it for the ſake of the other children, who might not want it. Since the determinations, in which it has been conſidered, that the veſting of a portion is to depend upon the time, when the child ſhould want it, and that the word "payable" may be conſtrued "veſted," the Court ought to find very ſtrong words to juſtify a different conſtruction under ſuch circumſtances, a child dying and leaving a family. No ſuch intention can be inferred from this ſettlement. In the clauſe poſtponing the payment till three months after the death of the father, it is not ſaid, if ſuch child ſhall be then living. In the proviſion that advancements by the father ſhould be conſidered as on account of the portions, unleſs he ſhould by writing ſignify the contrary, the ſettlement ſpeaks of any of the children entitled to portions; which muſt be having attained the age of twenty-one or married; for, unleſs that is the meaning, they could have no title to the portions in his life. The ſame expreſſion is uſed in the proviſion for ſurvivorſhip.

The Solicitor General, Mr. Sutton, and Mr. Harvey, for the defendants—There was no veſted intereſt under this ſettlement in any child, who did not ſurvive the father. The intention muſt be found through the medium of the words. Though ſuch a proviſion may be very unuſual and unreaſonable, it is not illegal, or ſuch as this Court will refuſe to execute. Parties may provide, that a portion ſhall not be raiſed for the adminiſtrator of a deceaſed child. It is impoſſible to uſe more clear words to ſhew that in-

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(*a*) 3 *Bro. C. C.* 569.

tention. In the caſes cited there could be no queſtion, that upon the intermediate clauſe between the introduction and the proviſo the portion would be veſted; and the language of the proviſo in *Cholmondeley* v. *Meyrick* is very different from this; for there it is, in caſe any ſhould die "before his, her, or their, portions ſhould become due or payable." Upon any conſtruction of this ſettlement there are events, in which the grand-children would not have been entitled to the benefit of it. If in theſe caſes there ſhould be no children living, but all had left children, the term in that caſe would be determined; and there would be no right to raiſe any portion. If that was the meaning, is it very abſurd to go a little farther; and provide, that the children ſurviving ſhould take the whole, not the repreſentatives of a deceaſed child? *Wingrave* v. *Palgrave* (a) is very material in this view. The proviſo there only repeats at the end what was in effect expreſſed in the beginning of the ſettlement; that if no child ſhould be living at the death of the parent, nothing ſhould be done under the term. The defendant's conſtruction is perfectly conſiſtent with the whole ſettlement. If all the children die, leaving children, nothing is to be done under the truſt: if ſome die, then all ſhall accrue to thoſe living at the death of the father. So, if a younger ſon becomes the eldeſt, his portion is to go to the others. The ſame conſtruction muſt be put upon that as upon the clauſe deveſting the intereſt by death; and the plaintiff muſt in the ſame way contend againſt that: but the proviſion is expreſs; and the intention muſt be admitted, that, if he became the eldeſt ſon, his intereſt as a younger ſon ſhould go to the others. The words "entitled to portions" in the clauſe reſpecting advancements by the father do not vary the conſtruction; for it cannot be denied, that a power was given to him to advance the portions in his life; and if he had, that would be a veſted intereſt, and alſo put in poſſeſſion; and that clauſe extends to an advancement at any time of the child's life. In *Willis* v. *Willis* the Lord Chancellor thought it very material in theſe caſes to aſcertain, what would be the deciſion in certain events. The plaintiff's conſtruction is impoſſible; unleſs the introductory words are expunged; and is quite inconſiſtent with the proviſion, under which, if there had been ten children, who all died in the life of the father, this ſum could not

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(a) 1 *P. Will.* 401.

1801. Hope v. Lord Clinton. have been raiſed. If one of ten children had ſurvived, could the Court ſay, the repreſentatives of the other nine would be entitled? Such a conſtruction, making it depend upon the event, would be prepoſterous. The circumſtance of there being a child living, &c. is a condition precedent to raiſing the portion. Whether the father would leave a child was in uncertainty during his life. Therefore during his life the whole 5,000*l.* was in contingency; and if ſo, no part could during his life be veſted in any child. The power given to him to direct the 5,000*l.* to be raiſed during his life was for the purpoſe of enabling him to make that a veſted intereſt, which otherwiſe would during his life be a contingent intereſt: but that power was never executed. This event of a younger child attaining twenty-one and dying in the life of the father probably did not occur to the drawers of the ſettlement; and therefore was not provided for; as, upon wills particularly, there are many events, of which the parties had no foreſight. The introductory words are the firſt thing; upon which the whole proceeds; and muſt prevail, unleſs afterwards explained. In *Wingrave* v. *Palgrave* the Lord Chancellor goes much upon the proviſo as to the term ceaſing: but the words in this ſettlement as to that leave the queſtion juſt as it was; and the contingency, upon which the term was to ariſe, has happened.

Mr. Manſfield in reply—According to the letter the event, in which this ſum is not to be raiſed, has not happened. There is the ſtrongeſt implication upon the whole of this ſettlement, that the children might become entitled to portions in the life of their father. If ever latitude is to be allowed to words, it ought upon a marriage ſettlement; the object of which is to provide for the iſſue. Upon the whole of this ſettlement taken together it is a proviſion for the iſſue of the marriage. No argument ariſes from what is thrown in with reſpect to a younger ſon becoming the eldeſt; for the law of this Court would have produced that effect, whether expreſſed, or not; and that is not determined by the time of veſting; for if he became the eldeſt ſon before the day of payment, he would loſe his portion. *Chadwick* v. *Doleman* (a), and other caſes.

(a) 2 Vern. 528.

Lord Chancellor—Though I agree with Lord *Thurlow*'s expreſſion in *Woodcock* v. *The Duke of Dorſet*, that the words are ſtrong, and difficult to manage, and notwithſtanding the ſtrength of opinion expreſſed by the Counſel againſt this claim, I feel a ſtrong inclination at this moment in favour of it. It is quite clear upon all the caſes, that, to get rid of the difficulty, the Court looking upon it as a hard thing to impute to a father, that he ſhould mean, a child having attained twenty-one, or come to marriageable years, and formed a family, yet, becauſe that child dies in his life, the deſcendants ſhould have nothing, and feeling that not to be a probable intention in a parent, have thought themſelves at liberty to manage the conſtruction of the words, as they would not in the caſe of a ſtranger, or upon a matter of contract, without any mixture of parental feeling. In *Wingrave* v. *Palgrave* it is obvious, if a ſon had lived to the age of twenty-one, he might have deſtroyed the truſt term. Of neceſſity therefore a circumſtance exiſted, that is relied upon for the defendants in this caſe, that the claim of the daughter muſt have been contingent during the whole life of the father; as he might have a ſon. Two contingencies are expreſſed in that caſe: dying without an heir male, and leaving a daughter or daughters; and that from the context, which gives a clear expoſition, that it was not meant having had a daughter, muſt mean at his death. In *Woodcock* v. *The Duke of Dorſet* alſo the expreſſion is "leave." In the former caſe it was held a condition precedent; becauſe the word "leaving" meant upon the context at his death; and ſecondly, becauſe the term at law was gone; and it muſt have been conſidered by the Court, as if never in the ſettlement. It was impoſſible therefore, that there could be any doubt upon that caſe.

The caſe of *Emperor* v. *Rolfe*, the date of which I mark, in 1748, was very like a new deciſion. It ſeems therefore to have been a long time, before the Court could get over the natural effect of words ſo ſtrong and ſo difficult to manage. The conſtruction in that caſe was, that the words "grow due and payable" were, for the benefit of the eſtate, and attending to the motives of parental feeling, with reference to the age of twenty-one or marriage in the life of the parent, to ſecure the portion. There was a contingency there; at leaſt a contingency to deveſt what was veſted under the former words. That is certainly different

rent from this caſe; in which it is contended, that the contingency is one, that prevents the veſting, not merely to deveſt. *Cholmondeley* v. *Meyrick*, which in the ſubſequent caſe of *Willis* v. *Willis* the Lord Chancellor cites from an accurate note of the ſettlement, was decided in 1758. A very material circumſtance in that caſe is, that the father might have appointed by will. It might have been argued, that thoſe, who were to take for want of appointment, were the objects of appointment. The difficulty was, that as he had the power of appointing by will, the children to take could not be determined, till he was dead. It might therefore have been contended, that it did not mean children, unleſs they ſurvived; ſo as to be the objects of ſuch an appointment. But the caſe in default of appointment having actually happened, and a child having attained the age of twenty-one in the life of the parent, though the words were "due or payable," which have the ſame meaning as "due and payable" in *Emperor* v. *Rolfe*, the Court would not be entangled with the other queſtion; but ſaid, they were glad, the caſe had not ariſen, in which that argument could be preſſed; and as there was no appointment, *Emperor* v. *Rolfe* might be followed, though the child died in the life of the parent; and died, not before one contingency, before the portion became due, though before the other, its becoming payable.

A great many caſes have followed in this Court; proceeding upon the authority of theſe two. The next, that was cited, is *Woodcock* v. *The Duke of Dorſet*; which is ſtronger than any other; for, if the word "leaving" is conſtrued in the context with "ſurvivor," it is impoſſible to deny, that there was a contingency exiſting during the lives of the parents; as it is contended that there is here. The recital is a circumſtance in the deed, upon which you can argue to the intention: but it is not that ſort of circumſtance, that the Court would, except between parent and child, lay hold of to deſtroy by the recital the obvious and clear effect of the words in the other parts of the deed. The words in this caſe are much ſtronger than thoſe in *Wingrave* v. *Palgrave*. The words "if there ſhould be but one ſuch child," upon the natural conſtruction muſt mean one child left at the death of the ſurvivor. It would be impoſſible to raiſe an ambiguity upon that in any other caſe than that of parent and child. In any other caſe the anſwer would be, that the Court had no

right

right to ſay otherwiſe; for the money would have been in the hands of Lord *Gower*; and no truſt upon it. But Lord *Thurlow* went this length; that in the caſe of parent and child a child having attained the age of twenty-one, and having occaſion for a portion, though dying in the lives of the parents, is a child living at the death of the ſurvivor. He certainly goes that length upon the intention; obſerving, that the words were very ſtrong and difficult to manage. *Willis* v. *Willis* is alſo a very ſtrong caſe; though diſtinguiſhable in ſome circumſtances: but if that had been matter of contract, where the relation was not conſidered, the deciſion could not have been, as it was, upon thoſe words.

I agree, in this caſe there are words difficult to manage: but the intention of the ſettlement, I mean the natural intention, regarding it as the caſe of father and child, muſt direct me, and theſe caſes authoriſe me to ſtruggle with language; for it is ſtruggling with language; and it does not follow, that becauſe caſes are put, in which I could not ſtruggle effectually, that I cannot prevail in the caſe, that has happened; if the words will bear me out in that according to the rules and authorities. Upon the true intention of this ſettlement, in poſſeſſion upon theſe caſes of this rule, that *primâ facie* a child having attained twenty-one or married is to be conſidered a child entitled to a portion, upon the ground, that I ſhall not impute to a father the intention to leave a child, having occaſion for a portion, without one, it is upon thoſe, who ſay, the child is not entitled, to ſhew that from the tenor and words of the ſettlement; and it is not enough for them to argue, that they have manifeſted that, becauſe they have pointed out another caſe, in which it would have been impoſſible for the Court to have ſaid, that child was entitled. If upon the words ſhe is entitled in the caſe, that does exiſt, the Court would rather give the portion than ſtruggle to ouſt her of it, becauſe in another caſe they would have ſtruggled ineffectually. In this ſettlement the truſt is prior to the eſtate tail. In that reſpect it is not like *Wingrave* v. *Palgrave*. But unqueſtionably it is a legal eſtate in remainder during the life of the father; and if there is a contingency, it is not in the creation of the term, but in the expreſſion of the truſts. As to that the words are exceedingly difficult to manage; and I cannot go the length of Mr. *Mansfield*, that the words "living at his deceaſe" mean born in his life. The words immediately

1801.

Hope v. Lord Clifden.

Poſthumous child to be conſidered as living.

immediately following, " or afterwards born alive," give a clear meaning to that; for though modern deciſions (a) have held, that a poſthumous child is to be conſidered a child living, that was not clear in 1739; when this ſettlement was made; and therefore theſe words are thrown in. I am therefore not authoriſed to ſay, there is not a contingency, properly expounded for the defendants. But the caſe of *Woodcock* v. *The Duke of Dorſet* is a direct anſwer to that; eſtabliſhing expreſsly, that notwithſtanding the contingency the portion is veſted according to the natural meaning of the words.

It is ſaid, if there was no younger child at the death of the father, none of theſe younger children could have had their portions. I do not conceive that. It might have been as well argued in *Woodcock* v. *The Duke of Dorſet;* in which caſe it is clear, that in that event Lord *Thurlow* muſt have held, that they would have had it; and in fact has held, that if they married or attained twenty-one, though they died in the life of both parents, they would have been entitled. There is not a word in the context to ſuſtain that opinion in that caſe. There is conſiderable context to ſupport it in this. The legal term exiſting, if it could be ſaid to exiſt at law, though all died in the life of the father, they ſhould take.

But it is not neceſſary to decide that here; for, if they could not have taken in that event, does it follow, that a child is not to take, when, there being ſome children ſurviving, the term not only exiſts, but the truſts are to be executed for ſome children? Conſider the words, and the queſtion; which is, whether, in caſe there is any child living at the death of the father, for whom the truſts ought to be executed, a child, who attained twenty-one or married, but died in the life of the father, is one of the objects of the truſt, that is to be executed for ſomebody. In this caſe and upon theſe authorities I ſhould ſay, the words " ſuch child" muſt refer to the immediate antecedent " all and every the child " and children," except an eldeſt or only ſon, not qualified by the contingency. Upon the clauſe as to what is to be raiſed in the life of the father, if the words introducing the contingency are to determine the character of the child, and no child but one living at the deceaſe of the father is entitled, how is the power to be exerciſed, and the proviſo to have effect? It may be ſaid, the father may direct ſuch a child to take, even though the contingency ſhould not happen, upon which the truſts of the term were to be exerciſed. There is not a word in the ſettlement in ſupport of that; and that would be as ſtrong a conſtruction to ſupport the act of the father as I am making to ſupport this according to former caſes. The other clauſes relied on for the plaintiff do not afford all the argument, that has been attributed to them. The expreſſion as to ſurvivorſhip ſtill includes the queſtion, who are entitled to portions.

(a) See *Ante*, vol. 4. 321, 322. 334. 341, 342, in *Thelluſſon* v. *Woodford*, and the references.

Upon the whole I have a ſtrong inclination, if I can, to conſtrue this in ſuch a manner as to hold the daughter entitled. The authorities go full as far: many of them a great deal farther. With that inclination I do not heſitate to ſay, it would be better to conſtrue all inſtruments according to their terms, and not to ſpell out what they might have meant. I ſhould have had great difficulty in going the length of prior authorities: but as they have gone ſo far, it is my inclination, and I think, my duty, to follow them. I ſhould have no objection to have this caſe ſpoken to again: but if that courſe ſhould not be taken, and I ſhould not mention it before the firſt day of cauſes, you will underſtand it is my opinion, that this may be ſupported.

No farther argument was offered at the Bar, and the Lord Chancellor not having expreſſed any change of opinion, the decree was made; declaring, that *Mary Hope* had a veſted intereſt in one third of the ſum of 5,000 *l.* and that the ſame with intereſt at the rate of 4 *per cent.* from the death of *Eliab Breton* ought to be raiſed by ſale or mortgage.

1801.

Nov. 28.

Ex parte GRANT.

Tenant for ninety-nine years, if ſhe ſhall ſo long live; remainder to truſtees to preſerve contingent remainders; remainder to the heirs of her body; remainder over to the ſame truſtees upon truſt for other perſons. Upon the application of thoſe perſons and the truſtees under the ſtat. 6 *Ann*, c. 18. the huſband of the tenant for life was ordered to produce her.

Mr. *Romilly* moved under the ſtatute of Queen *Ann* (*a*), that —— *Woodroffe* may be ordered to produce the body of *Mary Woodroffe*, his wife; to whom the eſtate in queſtion was limited for ninety-nine years, if ſhe ſhould ſo long live; remainder to truſtees to preſerve contingent remainders; remainder to the heirs of the body of *Mary Woodroffe*; and for default of ſuch iſſue to the ſame truſtees upon truſt to ſell, and divide the produce among certain perſons.

The motion was made on behalf of the truſtees and the *ceſtuy que truſts* in default of iſſue of *Mary Woodroffe*, upon affidavits, ſtating, that ſhe left her huſband nine years ago; and had not been ſince heard of; and that, while ſhe was known to be living, ſhe never had any child. The huſband continued to hold the eſtate in her right.

A doubt was ſuggeſted, whether this caſe was within the ſtatute; the application being made by perſons not immediately entitled upon the death of the party.

The Lord Chancellor requiring evidence, that *Mary Woodroffe* was not pregnant, when ſhe left her huſband, an affidavit was made; ſtating, that ſhe was not then pregnant to the beſt of the knowledge and belief of the deponents.

The Lord Chancellor under theſe circumſtances made the order.

(*a*) Stat. 6 *Ann*, c. 18.

ANONYMOUS.

Nov. 28.

Upon opening biddings the Court refuſed to diſpenſe with a depoſit, or to order a trifling one, upon particular circumſtances.

MR. *Stanley* moved to open biddings without making any depoſit, or at leaſt upon a very ſmall one, under theſe circumſtances; that the purpoſes, for which the ſale was directed, would be anſwered by the produce of the other lots, excluſive of that, which was the ſubject of the application; which was made by the tenant for life with remainder to his children; and the tenant for life meant to buy in that lot. It was alſo ſtated, that he was in diſtreſſed circumſtances.

Mr. Richards for the purchaſer inſiſted, that he had a right to retain his purchaſe, unleſs got rid of by another purchaſer in the regular courſe.

Lord CHANCELLOR—The miſchief is, that I ſhould diſcharge a purchaſer, who has made a depoſit, for one, who will not make one. The depoſit is the only hold the Court has upon the purchaſer. I recollect, when the manor of *Great Thurlow* in *Norfolk* was ſold, while Lord *Thurlow* was Chancellor; on whoſe behalf I moved to open the biddings before Sir *Thomas Sewell* upon an advance from 5,700*l.* to 6,700*l.* The Maſter of the Rolls inquiring, what depoſit would be made, I anſwered, that all the parties were ſatisfied with the purchaſer: the Maſter of the Rolls replied, not knowing the circumſtance, that if the Lord Chancellor was the bidder, he ſhould make a large depoſit; the depoſit being the only hold the Court has on a purchaſer; and ordered a depoſit of the whole advance.

This application deſires indirectly what could not be aſked directly. If an eſtate was directed to be ſold in ten lots upon a calculation, and nine having been ſold had produced ſo much more than was calculated, that there was no occaſion to ſell the tenth, and an application was made, ſtating, that the tenth was ordered improvidently to be ſold, and praying, that it might not, I do not know, that ſuch a motion would not ſucceed. But this lot has been ſold with the others. This therefore is deſiring me to do indirectly what could not be deſired directly, in this inſtance, the lot having been actually ſold; *viz.* that there ſhall not be a depoſit. There muſt be a depoſit; and it muſt be upon all the uſual terms (*a*).

A depoſit of 600*l.* was ordered.

(*a*) *Rigby* v. *Macnamara.* *Poſt.* 515.

Nov. 28.

COFFIN *v.* COOPER.

Anſwer referred for ſcandal on the motion of another defendant.

MR. *Newbolt* for one defendant moved, that the anſwer of another ſhould be referred for ſcandal; obſerving, that there was no precedent of ſuch a motion by a defendant; though by a plaintiff it is of courſe. If this cannot be done, the plaintiff and one defendant may combine to reflect upon the character of another. The principle as to ſcandal is to keep the Records pure.

Mr. Hall for the other defendants—The matter is relevant; and therefore not ſcandalous. It conſiſts of facts introduced to ſhew, that a will and codicil ought to be ſet aſide, as improperly obtained. In all caſes of fraud it is neceſſary to put in iſſue the material facts. *Fenhoulet* v. *Paſſavant* (*a*), before Lord *Hardwicke*. If relevant in any way, being material it can be neither ſcandal nor impertinence.

Reference for ſcandal upon the application of any one, not a party, or even without a motion.

What is material or relevant not to be conſidered ſcandal.

Lord CHANCELLOR—I do not recollect an inſtance of an application by a defendant: but I cannot conceive, that the Court would not do it even without a motion; and that it is not competent to any one to apply; and I would not lay down, that a perſon, not a party to the Record, could not. It is the duty of the Court to the public to take care, that its Records ſhall be kept pure. I agree, that, becauſe an anſwer ſtrongly reflects, it is not to be called ſcandal, if material, and relevant to the juſtice of the caſe. But the ſuggeſtion is enough to put it upon the Court to

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(*a*) 2 *Veſ.* 24.

examine, whether it is ſcandalous; and whether, if it is, it is not to be conſidered ſo, becauſe material or relevant.

Therefore refer it to the Maſter to ſee, whether this is ſcandal. With reſpect to the principle of ſending it to the Maſter in the firſt inſtance, whether upon the impoſſibility for the Court to inquire itſelf in the firſt inſtance, or whether it is partly upon delicacy as to character, I think there is enough in the latter ground for thinking it better to ſend it there than inquire into it here in the firſt inſtance. I think, there may be a difference between a plaintiff and a defendant referring for impertinence: but the ground of that difference does not apply to ſcandal.

Principle of referring ſcandal to the Maſter in the firſt inſtance.

Difference between plaintiff and defendant referring for impertinence, not applicable to ſcandal.

Ordered (*a*).

(*a*) For other diſtinctions in practice as to ſcandal and impertinence ſee *Pellew* v. ——, *ante*, 456. *Anon. Ante*, vol. 5. 656. *Anon.* 2 *Veſ.* 631.

RIGBY *v.* MACNAMARA.

Nov. 17, 28.

Mr. *Wetherell* moved, that one perſon might be ſubſtituted for another; who was a purchaſer under the decree.

The Court will not diſcharge a purchaſer and ſubſtitute another even upon paying in the money without an affidavit, that there is no under-bargain.

The purchaſer appeared by Counſel; and conſented.

The Lord Chancellor refuſed the motion; ſaying, this was one of the miſchiefs of conſent: the effect would be diſcharging a purchaſer, who had made a depoſit, for one, who might be worth nothing: but he ſhould be diſcharged, whenever the new purchaſer paid in the money (*a*).

The next day Mr. *Wetherell* moved on behalf of the new purchaſer, that on his paying the money he might be ſubſtituted, and the other diſcharged.

The Lord Chancellor ſaid, this might be an ingenious device, with a view not to come to the Court to open the bid-

(*a*) *Anon. Ante*, 513, the laſt caſe but one.

1801. RIGBY *v.* MACNAMARA.

dings; and he would have an affidavit, that there is no under-bargain; for the new purchaſer may give the other a ſum of money to ſtand in his place, and ſo deceive the Court.

REEVES *v.* BRYMER.

BRYMER *v.* REEVES.

Rolls, *Dec.* 1, 2.

Circumſtances not ſufficient evidence of a releaſe of a bond debt. Upon a queſtion of preſumption of ſatisfaction in a hard caſe the Court gave the executors leave to bring an action upon the bond; but would not direct it.

THESE cauſes (*a*) came on for farther directions after the Maſter's report; which among other things ſtated, that the executors had not poſſeſſed any part of the teſtator's eſtate ſince the 16th of *May* 1791, when the reſidue was diſtributed according to the decree, except a bond, dated the 27th of *September* 1766, from *William Brymer*, the defendant in the firſt cauſe, in the penal ſum of 800 *l*, with condition for payment of 400 *l.* with intereſt at the rate of 5 *per cent.* on the 27th of *September* next, and except certain leaſehold eſtates.

With reſpect to the bond the Maſter ſtated, that he found by the affidavit of *William Brymer*, that in 1766 he borrowed the ſum of 400 *l.* from the teſtator; and thereupon executed the aforeſaid bond. About five or ſix years afterwards the deponent's affairs became embarraſſed; and he applied again to the teſtator; who refuſed to advance him any more money; and alleged as a reaſon, that the deponent had already had 900 *l.* of him: meaning 500 *l.*, which the teſtator paid him as a marriage portion with his daughter, and the 400 *l.* ſecured by the aforeſaid bond; and that the deponent might do as he pleaſed with the ſum he then owed him; as he ſhould never aſk him for it, or require him to pay it; but that he would not advance him any thing more, or to that effect. Upon other occaſions, and many years after the execution of the ſaid bond, when the deponent had ſolicited the loan of money of the teſtator, he reminded the deponent of his having given him what he owed him on the aforeſaid bond; and aſſigned that as a reaſon for his refuſing to comply with the deponent's requeſt; and in conſequence of the teſtator's having repeatedly declared to the deponent, that he never meant to call

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(*a*) Reported, *ante*, vol. 4. 692.

upon him for payment of the aforeſaid bond, and the deponent never having been aſked or required by the teſtator to pay the ſame or any part thereof, the deponent conceived and verily believed, that the teſtator had many years ſince cancelled or deſtroyed the ſaid bond. The deponent farther ſtated that in 1778 he took the benefit of an inſolvent act. By that act (*a*) it is enacted, that the future real eſtates as well freehold as copyhold, ſalaries of offices under government, money, or money in the funds, or lent upon real ſecurity only, of every perſon or perſons, taking the benefit of the act, which after the time of his, her or their, total ſurrender of his, her, or their, eſtate and effects under ſuch act, he, ſhe, or they ſhall or may be ſeiſed of in his, her or their, own right, or uſe, by grant, demiſe, or purchaſe, ſhall remain and be liable to his, her, or their, reſpective creditors, &c.

Mr. Piggott, Mr. Richards, and Mr. W. Agar, for the plaintiffs, Mr. Romilly and Mr. Steele for parties in the ſame intereſt inſiſted, that the bond ought to be enforced.

Mr. Sutton and Mr. Hart for William Brymer—Either what is ſtated in the report is evidence of a releaſe, according to *Eden* v. *Smyth* (*b*) and *Aſton* v. *Pye* (*c*); or from the length of time a preſumption of payment or ſatisfaction ariſes.

Reply—Clearly there is neither payment nor ſatisfaction. The only queſtion is as to the releaſe. In *Eden* v. *Smyth* (*a*) there were many circumſtances: but the Lord Chancellor did not conſider it as a releaſe; though under all the circumſtances he thought, Sir *Frederick Eden* ought not to be ſued at law. In this caſe there are no circumſtances: there is nothing but this converſation between the teſtator and *Brymer* himſelf; which cannot be conſidered a releaſe of this bond either at law or in equity.

The circumſtance of taking the benefit of the act of inſolvency is ſufficient to rebut the preſumption. The Court will at leaſt ſend this to a Jury.

(*a*) Stat. 18 *Geo.* 3. *c.* 52.

(*b*) *Ante*, vol. 5. 341.

(*c*) Stated, *ante*, vol. 5. 350. 354.

(*d*) As to that caſe, ſee *Pole* v. *Lord Somers*, and *Druce* v. *Deniſon*, *ante*, 309. 385.

The Maſter of the Rolls—What was it conſidered to be in *Eden* v. *Smyth?* It muſt be ſomething. You ſay, it was not a releaſe; but it had an effect equally beneficial to the obligor. However numerous the circumſtances, all that goes only to the weight and amount of the evidence.

Dec. 2.

The Maſter of the Rolls—This objection to the right of *Brymer* to receive in right of his wife her proportion of the reſidue is, that he is debtor by this bond to the eſtate; and that proportion therefore ought to be applied to that debt in the firſt place. The bond is as old as 1766. He objects, that he ought not to be charged with it for two reaſons: 1ſt, On account of the intention of the teſtator to forgive him the debt: 2dly, That the preſumptive bar from length of time ought to operate againſt any demand upon it. Theſe two grounds are certainly inconſiſtent. The one ſuppoſes, the bond never has been paid, from the intention of the obligee never to demand payment of it: the other deſires the Court to preſume it ſatisfied. I ſhould not have been ſorry to have found any ſpecific ground, upon which I could have exempted this poor old man from this charge; for there is every reaſon to ſuppoſe, it was not the intention of the teſtator to exact it; and the defendant had from the lapſe of time and what paſſed between him and the teſtator no reaſon to believe, he did intend it. It is ſaid, there is evidence of a releaſe from what paſſed between them; and *Eden* v. *Smyth* is cited to ſhew, that ſuch circumſtances may amount to evidence of a releaſe. Firſt, *Brymer* does not ſtate, that he has any evidence, that he can produce, of what paſſed between him and the teſtator. Therefore in an action he could not avail himſelf of ſuch a defence. He does not ſtate, that any thing paſſed, except with himſelf, no other perſon being preſent. In *Eden* v. *Smyth* there was a letter of Mr. *Smyth*; in which he declared, he had releaſed. That was good evidence, from which it might be inferred, that an actual releaſe was executed. But, independent of that, I much doubt, whether, if all he ſtates to have paſſed with the teſtator could be proved, it would amount to evidence of a releaſe. It is very different from the aſſertion of Mr. *Smyth*. This is nothing more than that he never meant to demand payment. He ſays, he had given him the 400 *l.* he owed him upon his bond; that he might make what uſe he pleaſed of it; and he never meant to require payment, *&c.* All that is nothing more than a declaration by the teſtator, that he never would ſue for this money; which certainly is not ſufficient to operate as a releaſe; though if declarations of this kind are put in writing, if by a teſtamentary paper, it might operate as a gift to him of the money due upon the bond.

As to the other ground, of preſumption of ſatisfaction, if there was any probability of benefit to the obligor, I would certainly in ſuch a caſe put them to recover at law. But I fear, that would put him to a uſeleſs expence; for from the circumſtances I apprehend, they would ſucceed; and the bar would not operate. They would be able to ſhew from his own declarations, that he had not paid the bond; and that he proceeded upon quite a different ground, the forgiveneſs of the debt. It is only a preſumption; which may be rebutted by ſhewing, it was not paid; and that for many reaſons the preſumption from the length of time does not ariſe. The teſtator might have abſtained from ſuing him, becauſe it would have been to no purpoſe.

The plaintiff's Counſel then ſtating, that *Brymer*'s ſhare of the reſidue did not amount to what was due upon the bond, applied for a direction to the executors to bring an action.

The Maſter of the Rolls ſaid, he would not direct them to bring an action; but declared, that the executors ſhould be at liberty to bring an action upon that bond; that the other ſhares of the reſidue ſhould be paid; and *Brymer*'s reſerved till the event of the action; with liberty to apply.

1801.
July 27.
Dec. 5.

SITWELL *v.* BERNARD.

Teſtator directed the reſidue of his perſonal eſtate, ſubject to the payment of legacies, annuities, debts and funeral expences, with all convenient ſpeed to be laid out in real eſtates, to be ſettled in ſtrict ſettlement; and that the intereſt of ſuch reſidue ſhould accumulate, and be laid out in lands to be ſettled in like manner. Various circumſtances having delayed the collection and inveſtment of the perſonal eſtate, the tenant for life was held entitled to the intereſt from the end of a year after the death of the teſtator.

General rule, that legacies, where no intereſt is given by the will, ſhall carry intereſt at 4 *per cent.* only, and from the end of a year after death of the teſtator; except where it is given by way of maintenance, though the fund produces more; and the intereſt ſhall not be increaſed by the effect of appropriation.

A legatee having taken a mortgage in part payment, ſubject to an agreement for payment out of the other aſſets and a reſumption of the mortgage, was held entitled to the benefit of that agreement; accounting for the difference of intereſt.

FRANCIS SITWELL by his will, dated the 5th of *February* 1792, gave to his wife 1,000 *l.* a year during her life, as a jointure and in lieu of dower; and directed the ſame and all other annuities given by his will to be paid half yearly clear of all deductions; the firſt payment of them to be at the expiration of ſix months after his deceaſe; and he alſo gave to his ſaid wife his houſe near *Sheffield*, called *Mount Pleaſant*, with the appurtenances, together with the uſe of the furniture belonging to the houſe for her life; and after her death he gave the furniture belonging to the ſaid houſe to his executors, to be ſold and go as part of his perſonal eſtate, and he gave to his wife his town houſe in *Audley Square* with its appurtenances, together with the uſe of the furniture belonging thereto for her life; and after her deceaſe he gave the ſame to his executors, upon truſt to ſell his ſaid town houſe, and to divide the net money ariſing from the ſale thereof equally between his two ſons *Francis Sitwell* and *Hurt Sitwell.*

The teſtator then reciting, that *Samuel Phipps* under the truſts and powers in his (the teſtator's) late uncle's will had deviſed the real eſtates in the county of *Northumberland*, which were deviſed to the ſaid *Samuel Phipps* by the teſtator's uncle, in truſt to be ſettled on the teſtator for life, with remainder to his ſon *Francis Sitwell* for life, with remainder to truſtees to preſerve contingent remainders, with remainder to his (*Francis Sitwell's*) firſt and other ſons ſucceſſively in tail male, with divers remainders over, gave to his ſaid ſon *Francis Sitwell*, conſidering, he would be entitled to the ſaid *Northumberland* eſtates on his death, the ſum of 20,000 *l.*; and he gave to his ſon *Hurt Sitwell* 30,000 *l.*; which ſums he directed to be paid to them reſpectively on their attaining their reſpective ages of twenty-one; the intereſt of which ſaid reſpective ſums was (after applying thereout reſpectively what his executors ſhould think reaſonable for their reſpective maintenance and education) to accumulate from the time of his deceaſe at the rate of 4 *l. per cent. per annum* for the benefit of his ſaid two ſons reſpectively, to be added to the principal, until the ſaid principal ſums ſhould become payable; and it was his will, that his executors or the ſurvivor of them ſhould have power at his or their diſcretion to advance any part of the ſaid ſums of 20,000 *l.* and 30,000 *l.* reſpectively for the purpoſe of placing out or advancing his ſaid ſons *Francis* and *Hurt* or either of them in life, before ſuch ſon ſhould attain the age of twenty-one years; and in caſe his ſaid ſon *Francis* ſhould die under the age of twenty-one years, then the teſtator directed, that his ſaid legacy of 20,000*l.*, or ſo much thereof as ſhould not have been applied or advanced, as aforeſaid, ſhould ſink into the reſidue of his perſonal eſtate. The teſtator gave a ſimilar direction with reſpect to the legacy of 30,000 *l.* given to his ſon *Hurt*.

The teſtator then gave to his grandſon *Charles Wake* 5,000*l.*, to be paid him on his attaining the age of twenty-one, if he ſhould live to attain that age; but not to carry any intereſt in the mean-time; and if he died under that age, then to ſink into the reſidue of his perſonal eſtate. He gave to his ſiſter-in-law *Catherine Warneford* an annuity of 400*l.* for her life and 500 *l.*; to each of the children of his late niece *Catherine Slater* 400*l.*, to be paid to ſons at twenty-one, or to be ſooner applied for their benefit, if his executors ſhould ſee fit, and to daughters at twenty-one or days of marriage, which ſhould firſt happen; to *Richard Slater* 200 *l.*; to his niece *Jane Heaton* an annuity of 100 *l.* during her life for her ſeparate uſe and 100 *l.*; and in caſe ſhe ſhould marry and leave iſſue, to each of her children 200 *l.*, to be paid to ſons at twenty-one, or to be ſooner applied for their benefit, if his executors ſhould ſee fit, and to daughters at twenty-one or days of marriage; and he directed, that intereſt at 4 *per cent.* ſhould be paid in reſpect of the legacies given to the children of his late niece *Catherine Slater* from his deceaſe, until their reſpective legacies ſhould become payable, as aforeſaid, and alſo in reſpect of the legacies given to the children (if any) of his ſaid niece *Jane* from her deceaſe, until the ſaid legacies ſhould become payable. He then gave ſeveral annuities and legacies, ſome to ſervants; and directed, that the ſeveral legacies and annuities before given ſhould be paid without prejudice to any ſums, which ſhould be due from him to any of the legatees or annuitants; and he directed his executors to continue ſome weekly and other allowances to ſome poor perſons at *Reniſhaw* in *Yorkſhire* during their lives; and he gave the furniture, plate, books, linen, china, wines, carriages, horſes, and effects, whatſoever, which ſhould belong to, or be in or about his houſe, offices, and grounds, at *Reniſhaw* at the time of his deceaſe, to his eldeſt ſon *Sitwell Sitwell* for his own uſe and benefit; and directed his executors to pay any annuities or legacies, which by any writing under his hand or ſigned by him at any time thereafter he ſhould direct or appoint to be paid.

He then gave all his perſonal eſtate unto his executors for the purpoſe of paying his ſaid legacies and annuities and his debts and funeral expences, and ſuch other legacies and annuities as he might thereafter give; and ſubject and without prejudice to the payment of any legacies, annuities, debts, and funeral expences, he directed his executors or the ſurvivor of them with all convenient ſpeed to lay out and diſpoſe of the reſt and reſidue of his perſonal eſtate in the purchaſe of manors, lands, tenements, or hereditaments, in *England* of inheritance in fee ſimple in poſſeſſion, to be ſettled, as thereinafter mentioned; and directed, that the intereſt of ſuch reſidue of his perſonal eſtate ſhould accumulate and be laid out in lands to be ſettled in like manner as he had directed the reſiduum of his perſonal eſtate.

The will then directed the limitations of the eſtates, ſo to be purchaſed, in ſtrict ſettlement to the teſtator's eldeſt ſon *Sitwell Sitwell* for life, without impeachment of waſte, with remainders to his firſt and others ſons ſucceſſively in tail male, then to *Francis Sitwell* and his ſons, *Hurt Sitwell*, and his ſons, *Charles Wake* and his ſons, reſpectively, in the ſame manner; and the ultimate remainder to the teſtator's right heirs; with powers for his ſon and grandſon, when in poſſeſſion, to grant leaſes, not exceeding twenty-one years; and he declared, that the legacies and eſtates therein before given and limited to his ſaid three ſons *Sitwell*, *Francis*, and *Hurt*, by that his will, were on condition of their joining, as to his ſon *Sitwell* as ſoon as might be after his deceaſe, and as to his ſons *Francis* and *Hurt* as ſoon as might be after they ſhould reſpectively come of age, in ſuch acts, deeds, fines, recoveries, and aſſurances, as his executors ſhould require to confirm *Phipps*'s diſpoſition of his (the teſtator's) uncle's eſtates in the county of *Northum-*

Northumberland; and in caſe any of his ſaid ſons ſhould within twelve months after ſuch reſpective times, as aforeſaid, refuſe ſo to do, they ſhould forfeit the legacies and eſtates thereby given to them; and the benefit of ſuch legacies and eſtates ſo forfeited ſhould go as part of the reſiduum of his perſonal eſtate. He appointed *Thomas Bernard* and *Richard Huddleſton* executors, and guardians of his ſons *Francis* and *Hurt*, until they ſhould attain their reſpective ages of twenty-one; empowering them to place out any monies, part of, or ariſing from, his perſonal eſtate, which ſhould come to their hands by virtue of his will, or any monies, part of his perſonal eſtate, which they ſhould retain as a fund to anſwer the payment of his legacies and annuities, on real or Government ſecurities, and to change the ſecurities. Then, after the uſual clauſe of indemnity, he requeſted, his ſon *Sitwell Sitwell* would ſettle his houſe, called *Mount Pleaſant*, after the deceaſe of his wife, with the grounds, *&c.* in ſuch manner that it ſhould be enjoyed as an hoſpital for the benefit of the town of *Sheffield* and neighbourhood.

By a codicil, dated the 13th of *December* 1792, ſtating among other things, that his wife had died ſince his will, he gave to his ſon *Sitwell Sitwell* all his plate, linen, and china, which was given to his wife; and directed, that the diamonds and jewels ſhould be valued, and made into three ſeparate lots of equal value, to be divided between his three ſons; and he gave to his ſaid ſons *Francis Sitwell* and *Hurt Sitwell* 10,000 *l.* each in addition to the ſaid ſums of 20,000 *l.* and 30,000 *l*, given them reſpectively by his ſaid will: the ſaid ſums of 10,000 *l.* each to be paid to them at the ſame times and upon the like events and with the like intereſt as directed concerning the ſaid ſums of 20,000 *l.* and 30,000 *l.* by his ſaid will. He gave to his daughter-in-law Mrs. *Sitwell Sitwell*, in caſe ſhe ſhould ſurvive her huſband, an annuity of 400 *l.* for her life, in addition to her jointure, to be paid half yearly: the firſt payment to be made at the end of ſix Calendar months after the death of his ſon *Sitwell Sitwell*; to his grand-daughter *Mary Alice Sitwell* 2,000 *l.*, to be paid on her attaining twenty-one, but not to carry intereſt in the mean time; and if ſhe ſhould die under that age, then to ſink into the reſidue of his perſonal eſtate. Then, after ſome farther pecuniary legacies, ſpecific legacies of linen and furniture, and ſome annuities, the firſt payment to be at the end of ſix months after his deceaſe, he gave to the Lying-in Hoſpital, to which his wife was a ſubſcriber, 200 *l.*, to be paid out of his perſonal eſtate; and reciting, that ſince the making of his will the truſtees of the *Sheffield* Infirmary had fixed upon a ſcite for building an infirmary, towards which he had ſubſcribed 500 *l.*, he gave to the truſtees of the ſaid infirmary the farther ſum of 500 *l.*, to be paid out of his perſonal eſtate towards the building of the ſaid infirmary. He revoked the requeſt in his will reſpecting his houſe and grounds at *Little Sheffield* being ſettled by his eldeſt ſon to be enjoyed as an hoſpital; and gave the ſaid houſe and grounds to his ſaid ſon *Sitwell Sitwell*, his heirs and aſſigns for ever. He empowered and directed his executors in the ſettlement directed of the manors, lands, *&c.* to be purchaſed with the reſidue of his perſonal eſtate, to ſecure, charge, and make payable, out of ſuch manors, *&c.* to be purchaſed with the reſidue of his perſonal eſtate, the ſums given or directed to be paid by his will and codicil for the benefit of the ſeveral annuitants and other perſons; and he gave *Thomas Bernard* the annual ſum of 200 *l.* during the firſt ſeven years after his deceaſe, as a compenſation for his loſs of time, but not as a ſatisfaction for his expences in the execution of the will; and he directed all the legacies and annuities by the codicil to be in addition to thoſe by the will.

By another codicil, dated the 28th of *July* 1793, the teſtator gave a legacy of 100 *l.* He died in *September* 1793; leaving a perſonal eſtate amounting to upwards of 150,000 *l.*; a conſiderable part of which being outſtanding on large mortgages could not be got in; and in *Michaelmas* Term 1797 the bill was filed by *Sitwell Sitwell*; praying the neceſſary accounts; and that it may be declared, that the plaintiff is entitled to the intereſt of the clear reſidue of the perſonal eſtate, not ſpecifically bequeathed, ſo far as ſuch reſidue had not been laid out in the purchaſe of land under the will, from the end of one year after the teſtator's death, or ſuch other period as the Court ſhould be of opinion the plaintiff was entitled thereto; that ſuch intereſt might be paid to the plaintiff; that ſuch parts of the reſidue as had not been laid out in the purchaſe of lands might be ſo laid out according to the will, and ſubject to the payment of the ſaid legacies to the defendants *Hurt Sitwell*, *Charles Wake*, and *Mary Alice*

Sitwell; that the plaintiff may be let into poſſeſſion of the eſtates, when purchaſed, ſubject to the annuities, *&c.*; and that in caſe the Court ſhould be of opinion, that the legacies given to *Hurt Sitwell* ought then to be provided for out of the perſonal eſtate not ſpecifically bequeathed, then that a ſufficient fund might be ſet apart out of ſuch perſonal eſtate to anſwer the ſame, in caſe he ſhould become entitled thereto; and all neceſſary directions, *&c.*

The decree, pronounced in 1798, directed the uſual accounts and payment of the legacies and the arrears of the annuities; and an appropriation to anſwer the legacies to infants and the annuities: an inquiry, what ſteps had been taken to get in the perſonal eſtate outſtanding upon ſecurities; that the Maſter ſhould ſtate the clear reſidue, and how it had been diſpoſed of, and diſtinguiſh what part conſiſted of principal, and what part had ariſen from intereſt, from the end of twelve months after the teſtator's death.

The Maſter by his Report, made in *November* 1800, ſtated the accounts; and that all the legacies had been paid except the legacies of 30,000 *l.* and 10,000 *l.* to *Hurt Sitwell* and the 5,000 *l.* to *Charles Wake*, and 2,000 *l.* to *Mary Alice Sitwell*. *Hurt Sitwell* attained twenty-one on the 26th of *June* 1799. *Francis Sitwell* attained twenty-one in *October* 1796; and ſoon afterwards applied to the executors for payment of his legacies; when they informed him, that having contracted for the purchaſe of an eſtate, which would require great part of the money then in their hands, they could not without great inconvenience to the truſt pay him the whole in caſh; but they were willing to pay him in the following manner; in caſh 12,500 *l.*, and the remaining ſum of 17,500 *l.* part of a mortgage debt of 33,000 *l.*, due to the teſtator, ſecured upon the eſtates of the late *Saville Finch*, Eſquire. *Francis Sitwell* in anſwer ſtated, that in order to benefit his brother he was willing to receive his legacies in the manner propoſed, upon condition, that the executors ſhould out of the firſt monies, which ſhould come to their hands, pay him the ſaid ſum of 17,500 *l.* and reſume the mortgage; which they agreed to. In confidence of that he accepted the 12,500 *l.* and a transfer of the mortgage; and in *April* 1798 on his application to the executors to reſume the mortgage a memorandum, dated the 16th of *April* 1798, was ſigned by *Francis Sitwell* and the executors; ſtating, that it was underſtood and agreed, that the mortgage of 17,500*l.* ſhall be taken back; and the mortgage money paid to *Francis Sitwell* out of the monies expected to be ſhortly paid in part of a mortgage of 51,000*l.* due to the teſtator's eſtate; part of which had been lately paid to the executors, and applied by them, except, 1,500*l.* lent to *Francis Sitwell* on his bond; and the reſidue is in a courſe of payment; and this is agreed to by the executors, as far as they can conſiſtently with their duty and the due execution of their truſt.

The report farther ſtated, that accordingly on the 16th of *April* 1798 the defendants advanced to *Francis Sitwell* 1,500*l.* upon his bond. He therefore claimed 16,000*l.*; offering to retransfer the mortgage; and the executors alſo claimed to have that ſum paid to him in part reſumption of the mortgage; which claims the Maſter ſubmitted to the Court.

The Report ſtated, that the only ſums remaining due on mortgage excluſive of the ſaid 17,500*l.* are 20,000*l.*, the balance of the ſaid mortgage for 51,000*l.*, and another mortgage for 17,500*l.*; that ſoon after the teſtator's death notices were given to pay the ſaid mortgage debts: but the heir of the mortgagor for 51,000*l.* being a minor, no proceedings could be had with effect, until he attained twenty-one in *June* 1796. The defendants were induced to delay filing a bill by a propoſal to pay the mortgage by a ſale; which took place accordingly: but many of the purchaſers not being able to complete their purchaſes, the defendants had been compelled to receive the money by inſtalments; conceiving that more for the benefit of the teſtator's eſtate than to file bills: but from the difficulty in raiſing money in the preſent times and other circumſtances 20,000*l.* ſtill remained due.

With reſpect to the other mortgage of 17,500*l.* the Report ſtated, that the executors in *Eaſter* Term 1796 filed a bill; and upon the 23d of *May* 1798 obtained a decree for a forecloſure:

but ſeveral orders for time had been obtained: the laſt upon the 20th of *January* 1800 for ſix months.

The report then ſtated, that the executors had laid out part of the perſonal eſtate in the purchaſe of real eſtates; one of which they purchaſed from the plaintiff.

The queſtions were, 1ſt, Upon the plaintiff's claim to the intereſt of the perſonal eſtate from the end of a year after the teſtator's death.

2dly, As to the right claimed by *Francis Sitwell* to have the mortgage reſumed by the executors, and the remainder of his legacy paid in money.

3dly, Upon the claim of the legatees to intereſt at 5 *per cent.*

Mr. Romilly, Mr. Holliſt, and Mr. Cox, for the plaintiff—Upon the firſt queſtion, there is no caſe preciſely like this: but *Hutcheon* v. *Mannington* (*a*) bears a ſtrong analogy. That was the caſe of a legacy, given over, if the legatee ſhould die, before he might have received the legacy. This reſiduary diſpoſition would be very clear, except for the latter part; for the perſons beneficially entitled could not be prejudiced by the negligence of the truſtees; who would have been bound to lay out the fund at the end of a year after the death of the teſtator. The latter part of the clauſe would be ſatisfied by the intereſt accumulating within the year, the uſual time allowed for the executor to collect the property. Another way of ſatisfying thoſe words is by referring them to the legacies to his grandſon and grand-daughter, directed not to be paid till the age of twenty-one, and not to carry intereſt in the mean time. This is to be conſidered, as if the plaintiff had no other proviſion under the will. He could not mean, that the executors ſhould have the power of delaying the inveſting of his perſonal eſtate in land, as long as they thought proper. They delayed three years, before they even took ſteps to call in the mortgages. They might have had a decree *niſi* againſt the infant

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(*a*) *Ante*, vol. 1. 366. 4 *Bro. C. C.* 491. *note.* *Gaſkell* v. *Harman*, *ante*, 159.

mortgagor. But the other mortgagor was of age. In *Hollingſworth* v. *Hollingſworth* there was a deviſe in truſt to ſell, and divide the produce among brothers and ſiſters, or their children, in caſe any ſhould be dead, before the eſtates ſhould be ſold. The bill was filed by ſome children, upon the ground, that the eſtates were not ſold during the lives of the parent: but the Lord Chancellor held decidedly, that it made no difference; for the eſtates were to be taken to have been ſold at the death of the teſtator. The caſe of *Entwiſtle* v. *Markland* (*a*) is a direct authority for giving the tenant

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(*a*) *Bertie Entwiſtle* v. *Markland*.—In Chancery, 24th *July* 1795.

Henry Entwiſtle, Eſq. by his will, dated the 10th of *Auguſt* 1775, after directing his legacies, debts, *&c.* to be paid out of his perſonal eſtate, as to all his money and ſecurities for money, and all his eſtate and intereſt in ſuch ſecurities by mortgage or otherwiſe, and all his plate, jewels, goods, and perſonal eſtate, whatſoever gave and bequeathed to the defendant *Markland* and others; upon truſt as ſoon as might be after his death to call in and receive all the money due to him on the ſaid ſecurities or otherwiſe with the intereſt thereof, and to convert all his other perſonal eſtate into money; and without delay and with all convenient ſpeed to lay out and apply the whole of all ſuch monies and the intereſt thereof to accrue and accumulate in the mean time in and for the purchaſe of freehold lands and tenements of inheritance in *England*, to be conveyed on ſuch purchaſes thereof from time to time to the truſtees and the ſurvivor and his heirs and aſſigns, upon truſt to and for the uſe of ſuch perſons and for ſuch eſtates and with ſuch limitations and in ſuch manner as therein after declared as to ſuch purchaſed lands and tenements; and immediately after the purchaſe thereof, as alſo as to all the meſſuages, *&c.* whereof he ſhould be ſeiſed at his deceaſe, he deviſed the ſame to the truſtees and the ſurvivor and his heirs; to the uſe of his brother *Robert Entwiſtle* for life without impeachment of waſte; with remainder to his truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male; remainder to the plaintiff for life without impeachment of waſte; with like remainders to the truſtees and to his ſons; and with other remainders over. The truſtees were appointed executors.

By a codicil the teſtator for the better collecting and getting in his perſonal eſtate gave his executors full power to ſettle all accounts; and he alſo gave them like power either to continue or to call in and lay out again, until proper purchaſes could be found, all or any part of his money at intereſt on ſuch ſecurity real or perſonal or funds as they ſhould think proper.

The teſtator died upon the 25th of *January* 1784. *Robert Entwiſtle* died on the 30th of *April* 1787. The plaintiff by his bill prayed (*inter alia*), that he might be declared entitled to the intereſt of the reſidue of the teſtator *Henry Entwiſtle*'s perſonal eſtate from the death of *Robert*.

Upon the Maſter's report it appeared, that the firſt tenant for life had poſſeſſed a conſiderable part of the perſonal eſtate; and agreed to ſell real eſtates of his own to the executors to the uſes of the will. It appeared alſo, that there had been opportunity of laying out part of the perſonal eſtate; which had not been ſo laid out; and that ſeveral parts of tenant for life the intereſt, not only of the money not laid out in land, but of what had not been collected. The late Lord Chancellor directed the intereſt to be computed from the end of a year, as a reaſonable time. Some ſuch line muſt be drawn. The Court muſt ſolve the difficulty. It cannot reſt with the diſcretion of the executors; or depend upon the greater or leſs degree of diligence exerted in getting in the eſtate. The fair time is the end of a year from the teſtator's death; according to the common rule as to legacies; which is eſtabliſhed for convenience; to avoid the difficulty of inquiring in all caſes, when the funds were actually got in. Some other period more ſatisfactory muſt be found: or that rule muſt prevail. With great induſtry perhaps the executors might have got in this property within the year: under ſome circumſtances it could not be done in ſeveral years. *Stuart* v. *Bruere* (*a*) is another ſtrong authority for this claim.

Upon

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of the perſonal eſtate were out upon mortgages; on which it had become impoſſible for want of heirs and perſons abroad to get in the money: the report ſtating the evidence of an attorney as to what he had done for that purpoſe.

The cauſe coming on for farther directions, it was declared, that the perſonal eſtate of the teſtator *Henry Entwiſtle* not having been applied, as the ſame was got in and received, in the purchaſe of real eſtates, purſuant to the directions of the will, the plaintiff *Bertie Entwiſtle* was entitled and ought to receive the intereſt of ſuch perſonal eſtate or of ſuch part thereof, which had been got in and received, and not ſo applied, from the death of the teſtator *Robert Entwiſtle*; and it was ordered, that the ſeveral ſums of intereſt appearing by the Maſter's report, dated the 30th of *December* 1794, to have been paid into the hands of *Jones* and Company at 2 and 3 *per cent. per annum*, amounting to 425 *l.* 4 *s.* 10 *d.*, and the ſums of 597 *l.* 2 *s.* 8¼ *d.* and 295 *l.* 17 *s.* 6 *d.* in the report mentioned to have been received by *Markland* and *Chadwick* on account of ſuch intereſt, be paid by the ſaid defendants to the plaintiff *Bertie Entwiſtle* out of 3405 *l.* 17 *s.* 10 *d.*, caſh paid into the bank of *Jones* and Company; and that the remaining ſum of 4140 *l.* 15 *s.* 4 *d.*, the balance of 5543 *l.* 12 *s.* 3¾ *d.*, being the total amount of ſuch intereſt, reported to have accrued from the death of *Robert Entwiſtle*, and which is ſtill outſtanding, together with the future intereſt of the outſtanding perſonal eſtate of the ſaid teſtator *Henry Entwiſtle*, until the ſame ſhall be got in and laid out in the purchaſe of lands, be paid to the plaintiff *Bertie Entwiſtle*, when and as the ſame ſhall be got in and received.

(*a*) *Stuart* v. *Bruere*—At the Rolls, 2d *December* 1785—Before the Lord Chancellor, 29th *July* 1793, 1ſt *April* 1794.

E. E. Hewer by will, dated the 28th of *March* 1782, deviſed to the defendants *Bruere* and *Spooner* and the ſurvivor of them, his heirs and aſſigns, an undivided fourth part of a freehold eſtate at *Clapham, Surrey*; upon truſt, that they ſhould as ſoon as conveniently might be after her deceaſe ſell the ſame; and out of the money ariſing thereby

and

Upon the ſecond queſtion, *Francis Sitwell* having taken this mortgage is now bound; and cannot inſiſt on having his whole legacy

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and the rents and profits accruing before ſuch ſale ſhe directed her ſaid truſtees to pay and diſcharge all incumbrances, which at the time of her deceaſe might be on her part or ſhare of any money in the public funds; and the remainder of all ſuch profits of the ſaid premiſes till ſuch ſale, ſhe directed her ſaid truſtees to place out on Government ſecurities; upon truſt to pay the intereſt and dividends of ſuch Government ſecurities unto the plaintiff, her nephew, for his life; and after his deceaſe to pay the intereſt and dividends to his ſons or ſon, (if more than one,) equally for life; and after the deceaſe of the ſon or ſons of the plaintiff to transfer one moiety of the Government ſecurities to the defendant *Abraham Blackborne*, his executors, or adminiſtrators, and the other moiety to the defendant *Charles Cockerell*, his executors or adminiſtrators. She then deviſed to the ſame defendants her undivided fourth part of a freehold eſtate at *Fotheringay* (*Northamptonſhire*); upon truſt, that they ſhould as ſoon as conveniently might be after her deceaſe ſell the ſame; and out of the money ariſing thereby and the rents and profits accruing due before ſuch ſale ſhe directed, that all principal and intereſt, which ſhould be then due on a mortgage of the ſaid premiſes, ſhould be in the firſt place paid and ſatisfied; and ſhe deviſed to the ſame defendants other freehold eſtates in *Norfolk* and at *Portſmouth*, ſome fee-farm rents in *Derbyſhire* and *Yorkſhire*, freeholds in *Burlington* ſtreet, *&c.*, together with all her monies in the public funds (not therein before diſpoſed of), upon truſt, that they ſhould as ſoon as conveniently might be after her deceaſe ſell the ſaid premiſes and money in the public funds; and out of the money ariſing thereby and the rents and profits accruing due before ſuch ſale ſhe directed her debts and funeral expences and her legacies to be paid. She gave the plaintiff 100*l.* and other legacies; and after payment of all her debts, funeral expences, and legacies, declared a truſt to pay and apply the remainder of what ſhould ariſe by ſale of her ſhare of the eſtate at *Fotheringay* and of her other premiſes, together with her money in the public funds, for the ſame uſes and upon the ſame truſts as what ſhould ariſe by the ſale of her ſhare of the eſtate at *Clapham*, after payment of all incumbrances. She then deviſed to the ſame defendants her freehold and copyhold eſtates at *Warfield Villa* (*Berks*) and her furniture therein, and other ſpecific effects; upon truſt, that they ſhould as ſoon as conveniently might be after her deceaſe ſell the ſaid premiſes and effects and all the reſidue of her perſonal eſtate; and place out the money ariſing thereby and the rents and profits accruing before ſuch ſale on Government ſecurities; and pay the intereſt and dividends thereof to the plaintiff for his life, and after his deceaſe to his eldeſt ſon for his life, and after his death to other perſons.

The teſtatrix died on the 10th of *January* 1785. The plaintiff, Sir *Simeon Stuart*, who was her heir at law, by his bill inſiſted, that he was entitled to receive the rents and profits of the real eſtates and the dividends of the money in the funds from a reaſonable time after the teſtatrix's deceaſe; and that they ought not, till all the eſtates were ſold, to be conſidered as part of the principal, to be laid out upon the truſts of the will.

The decree, made at the Rolls on the 2d of *December* 1785, after directing the general account of the teſtatrix's perſonal eſtate and its application, and the payment into the bank, it being admitted, that ſome part of the teſtatrix's real eſtate had been ſold, directed an account of the money; and the reſt of the eſtates to be ſold in the uſual manner, and the money to be carried to the account of each eſtate; and then directed legacy out of the perſonal eſtate, a deficient fund. He would have been entitled to intereſt upon his legacy at 4 *per cent.* only; and upon the mortgage he has received 5 *per cent.*

Mr.

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an account of the rents and profits of the ſaid real eſtates; diſtinguiſhing the rents of each of the ſaid eſtates reſpectively accrued ſince her death to the time of the ſale or ſales thereof reſpectively, received and to be received by the ſaid defendants, the truſtees; and what ſhould be coming on that account to be paid into the bank; to be placed to the credit of the cauſe to the like accounts as the money to ariſe by the ſale of the eſtates reſpectively.

The decree made by the Lord Chancellor on the 29th of *July* 1793 directed the defendant *Charlotte Bruere*, as adminiſtratrix of her father *Goulſtone Bruere*, to retain 206*l.* 0*s.* 8*d.*, the balance due to her on the account of the perſonal eſtate, the ſum of 660*l.* 0*s.* 9*d*, due to her for principal and intereſt of her legacy, and what ſhall be taxed for her coſts of the ſuit, out of 2,088*l.* 8*s.*, the balance reported due on account of the rents and profits, and pay the reſidue out of the aſſets of her father; and to transfer 9,965*l.* 7*s.* 4*d.* and 986*l.* 6*s.* 3*d.* 3 *per cent.* Reduced Annuities, and 7,403*l.* 1*s.* 7*d.* and 1,273*l.* 5*s.* 7*d.* 3 *per cent.* Conſolidated Bank Annuities, ſtanding in the names of the executors; of whom G. *B.* was the ſurvivor, to the Accountant General; and pay the intereſt now due thereon to the plaintiff: 7,205*l.* 19*s.*, part of the Reduced Annuities, to be carried to the account of the *Warfield* eſtate, ſubject to farther order: 986*l.* to the account of the perſonal eſtate; the reſidue of thoſe annuities to the account of rents of the real eſtate: 7,684*l.* 12*s.* 4*d.*, part of the Conſols, to be transferred to the account of the perſonal eſtate: the reſidue of the Conſols (991*l.* 14*s.* 10*d.*) to be carried to the account of the rents of the real eſtate: all the ſaid Bank Annuities to be ſubject to the contingencies in the teſtatrix's will, and ſubject to farther order: the intereſt to accrue on all the ſaid Bank Annuities before mentioned to be paid to the plaintiff until farther order. The ſum of 3,430*l.* 0*s.* 2*d.* caſh to be paid to the plaintiff: 7,456*l.* 16*s.* 5*d.* (part of 43,082*l.* 7*s.* 6*d.* 3 *per cent.* Annuities in the name of the Accountant General in truſt in the cauſe) to be carried over to the account of the perſonal eſtate: 10,096*l.* 17*s.* 6*d.*, other part, to be carried over to the account of money raiſed by ſale of the *Clapham* eſtate: ſo much of the reſidue of this ſtock (which conſiſts of the money raiſed by the ſale of the *Fotheringay*, *Norfolk*, *London*, and *Portſmouth*, eſtates, and the fee-farm rents, to be ſold, as will raiſe 3,573*l.* 10*s.* 6*d.*, due to *Elizabeth Stuart* for principal and intereſt of her legacy; and 5,413*l.* 2*s.* 3*d.* due to *Abraham Blackborne* for his debt, and coſts not before provided for, be ſold and thoſe ſums paid: the reſidue of thoſe Bank Annuities to be carried to the account of money ariſen by ſale of the eſtates at *Fotheringay*, *Norfolk*, *London*, and *Portſmouth*, and of the fee-farm, ſubject to the contingencies in the will; and the intereſt of theſe annuities to be paid to the plaintiff till farther order. An inquiry was directed, how much of the ſaid Bank Annuities aroſe from the rents and profits of thoſe eſtates accrued ſince the death of the teſtatrix, and previous to the ſale of thoſe eſtates; and as to thoſe rents and profits the parties were to be at liberty to apply.

By an order made upon the 1ſt of *April* 1794 it was directed, that ſo much of the ſum of 1,795*l.* 7*s.* 10*d.* 3 *per cent.* Annuities in truſt in the cauſe as will be ſufficient to raiſe 414*l.* 14*s.* 4*d.*, (being intereſt accrued ſince the 10th of *January* 1785, the day of the death of the teſtatrix) of 219*l.* 5*s.* 6*d.*, part of the money received by the defendant *Abraham Blackborne*, and by him paid into the bank; and laid out in the pur-

Mr. Manſfield and Mr. Hart for the infant tenant in tail in remainder, defendant—In this caſe the will is to guide the Court. The reſidue is never ſuppoſed to exiſt till the end of a year; upon the ſuppoſition, that by that time the executors will have collected aſſets enough to pay the debts and legacies, and that previouſly to that period they are employed in getting in the aſſets. In this caſe the intereſt is to be calculated upon the reſidue; and that does not exiſt legally before that period. The intereſt therefore cannot ſtop then. It is impoſſible to refer theſe words to the intereſt of the two legacies. That is not the intereſt of the perſonal eſtate. It probably occurred to the teſtator, that the mortgages could not be got in till after a period much longer than a year. One mortgage is for 50,000*l.* Knowing that, he might mean the intereſt to accumulate, and become a fund for the purchaſe of real eſtates as well as the principal. The plaintiff might have filed a bill, and compelled the executors to call in the money as ſoon as poſſible. *Hutcheon* v. *Mannington* is a very ſingular caſe. *Hollingsworth* v. *Hollingsworth*, as it is now ſtated, ſeems an extraordinary deciſion. Different objects were in view. It was a conſiderable ſtretch under thoſe circumſtances to ſay, the time of the ſale was not material. In *Entwiſtle* v. *Markland* the firſt taker lived between two and three years; and he muſt have had it: yet there is nothing in the decree giving any intereſt to him. The words of the will here are indefinite: but the direction is very ſpecific, with all convenient ſpeed to lay out the reſidue of his perſonal eſtate and all the accumulation, as an aggregate fund; and, till laid out in land, no perſon is to have any uſufruct. The plaintiff might lie by in colluſion with the executors, and take a larger income in this way.

The Solicitor General and Mr. Huddleſton for the defendant Hurt Sitwell—Notwithſtanding the words of the will, the legacy ought

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chaſe of the ſaid Bank Annuities, be ſold, and the ſum of 414*l.* 14*s.* 4*d.* paid to the plaintiff: the reſidue of the ſaid Bank Annuities to be carried over to the account of the teſtatrix's *Warfield* eſtate and general perſonal eſtate; and the dividends due and to become due upon the ſaid Bank Annuities until ſuch ſale and carrying over, and the future dividends of the reſidue of the ſaid Bank Annuities after ſuch ſale be paid to the plaintiff during his life in like manner as the intereſt and dividends of the other Bank Annuities ſtanding in the name of the Accountant General to the ſeveral accounts in truſt in this cauſe are directed to be paid by the former orders of the Court.

to carry intereſt at the rate of 5 *per cent.* inſtead of 4; being given out of a fund bearing 5 *per cent.*. In *Lewis* v. *Freke* (*a*) this point of intereſt was much conſidered. Lord *Hardwicke* was in favour of the higher rate of intereſt: *Beckford* v. *Tobin* (*b*), *Denton* v. *Shellard* (*c*); ſaying, the nature of the fund is to be conſidered. In 1793, when this legatee was of age, it was impoſſible to raiſe the money even at 5 *per cent.*

Mr. Murray for the defendant Francis Sitwell, the ſecond ſon, inſiſted, that he was entitled to his legacy out of the firſt aſſets, that come in; that he was not diſſatisfied with the agreement; but that it was not carried into execution according to the purport of it; and the executors had a ſufficient ſum to anſwer his legacy, if they had not engaged in the purchaſe.

Mr. Romilly in reply—They do not argue, that the executors might take as much time as they pleaſe; and prevent the tenant for life from having any benefit: but they muſt make out that propoſition. It is clear, the teſtator was not ſpeaking of the reſidue after all the debts and legacies paid; for he directs it without prejudice to the payment of the legacies, annuities, and debts. Upon the other conſtruction the words "with all convenient "ſpeed" muſt be ſtruck out. There was no laches in the plaintiff. The circumſtance, whether a bill is filed, or not, cannot alter the duty of the executors; but ſuppoſe, it was the caſe of an infant, what good reaſon can be aſſigned for not filing a bill of foreclоſure for three years? The indulgence to the mortgagor by enlarging the time ought not to prejudice the rights of others. In *Stapleton* v. *Palmer* (*d*) the ſame queſtion occurred.

The queſtion attempted as to the intereſt is perfectly new.

The Lord Chancellor having ſtated the caſe, delivered the following judgment: Dec. 5.

(*a*) *Ante*, vol. 2. 507.
(*b*) 1 *Veſ.* 308.
(*c*) 2 *Veſ.* 239.
(*d*) 4 *Bro. C. C.* 490.

1801.
Sitwell
v.
Bernard.

Under the circumſtances appearing in the Maſter's Report it was impoſſible for the truſtees to call in a very conſiderable part of the perſonal eſtate; attending to theſe obſtructions, which perhaps a wholeſome attention to the convenience of thoſe, who are debtors, throws in the way. This teſtator had a very large perſonal eſtate out upon ſecurity; partly upon a mortgage affecting the eſtate of an infant, under that ſpecies of embarraſſment, that it was very material for him, when of age, that a conſiderable part of his property ſhould be ſold; and the arrangement for payment to the eſtate of the teſtator took this courſe; that the purchaſers ſhould from time to time pay to the truſtees of this will the purchaſe money in part diſcharge of that debt; and perhaps that was as convenient and as expeditious a mode as any, that could be adopted; without prejudice undoubtedly to their perſonal remedies, if they had any; for the infant was not an obligor in the bond made upon the mortgage. It appears alſo, that a conſiderable part of the perſonal eſtate was ſecured upon a mortgage by Lord *Mulgrave*; and the executors, as far as they had it in their power to take remedies againſt the real eſtate charged with that debt, took thoſe ſteps certainly not ſo ſpeedily, as they might. Few ſteps were taken to call in a conſiderable part of the perſonal eſtate for four years; for, after they did begin, they found, they were embarraſſed by the circumſtances of the times; which produced from this Court an enlargement of the time of foreclosure; carrying it over a conſiderable period: an Equity, which binding the teſtator alſo bound his deviſees. The eſtate obviouſly conſiſted of a great variety of ſecurities, which, to render them productive, would occaſion great expence and delay; and it might have conſiſted of ſecurities hardly ſaleable, much leſs of ſuch, upon which the money was capable of being collected.

The caſe was reaſoned for the tenant for life in this way; that under ſuch circumſtances, and in all caſes of perſonal eſtate directed to be ſo laid out, conſidering, what it might be, it is incumbent upon the Court to adopt a period, at which it ſhould be conſidered as laid out with regard to the intereſts of the tenant for life and thoſe in remainder. The caſe afforded great difficulty in the terms of the will; providing for an accumulation of intereſt; and directing the intereſt accumulated to be laid out upon the ſame truſts in the purchaſe of land as the bulk of the property producing the accumulation. In anſwer to the ſuggeſtion, that an application ſhould have been made by the tenant for life to have the truſts executed, the caſe of an infant was put ſtrongly and fairly. The plaintiff happened to be of age: but if he had died, leaving an infant ſon, in which caſe the truſtees ought to have acted, as if a bill had been filed, the queſtion would have ariſen, what the Court ought to do upon a bill filed by the infant, when adult. It was alſo very ſtrongly ſaid for the plaintiff, that the caſe ought to be conſidered, as if he had no other proviſion under this will. It is true, he has real eſtates under it: but put the caſe, that he had not; and that he was to derive an intereſt, and that a life intereſt only, in the inveſtment of the perſonal eſtate in land: what ought to be the conſtruction as between him and the perſons in remainder; if it happened, that a great part or the whole was ſubject to difficulties and embarraſſments in the collection, which the teſtator could not have foreſeen? It may be aſked, are the truſtees immediately to file bills of forecloſure, whether prudently, or not; to admit no arrangement; to bring actions upon the bonds, and the covenants; to file bills for the purpoſe of following the aſſets of the original mortgagors; to inſtitute every ſpecies of legal diligence in every caſe, in which it might be wholeſome, and might perhaps be as prejudicial to the intereſts of thoſe in remainder by bringing into hazard the bulk of the perſonal eſtate, in order to forward the perception of intereſt by the tenant for life?

In this view of the caſe a very conſiderable queſtion ariſes upon the conſtruction of the will, addreſſed to the diſcretion of the Court. The firſt conſideration with reference to that is, how far the Court had in other caſes conſtrued inſtruments ſomewhat ſimilar in their terms; and in effect how far the Court had aſſumed ſuch diſcretion, as enabling them upon the whole to make a uſeful and wholeſome conſtruction of ſuch a will between particular intereſts and thoſe entitled to the bulk of the property. However difficult in the firſt inſtance to adopt ſuch a conſtruction, if in different inſtances ſuch wills have been ſo conſtrued, it would be very hazardous upon this will, almoſt in terms affording ſuch a conſtruction, not to adopt it: not only with reference to the caſe itſelf, but becauſe the refuſal to adopt it, even againſt ſtrong words, incurs the hazard of bringing into queſtion thoſe deciſions.

The firſt caſe upon words ſimilar, but very far from the ſame, is *Hutcheon* v. *Mannington*, before Lord *Thurlow*. The conſtruction Lord *Thurlow* thought himſelf of neceſſity obliged to put upon the words I thought then was too bold, if I may preſume to ſay ſo. His Lordſhip thought, there was an indication of a purpoſe, ſuch as was contended for by the plaintiff; but that it was impoſſible to inquire, when each and every part of the eſtate could have been received, collected, and got in; and ſeems to admit, that he was driven by the impoſſibility of meaſuring that purpoſe of the teſtator to conſider it veſted at his death; and he held all the legatees entitled to their legacies though none had received them. That caſe (*a*) is a ſtrong authority, particularly in the paſſage as to the direction to ſell real eſtate, to ſhew the length the Court will go upon general grounds of convenience in the conſtruction of a will, indicating a purpoſe, which it is almoſt impoſſible to execute conſiſtently with the other purpoſe, that the party, in whoſe behalf it is to be executed, ſhall beneficially enjoy the intereſt intended by the teſtator.

The caſe of *Stuart* v. *Bruere* was upon a will, which applies not only to the bulk of the property directed to be ſold, but goes the length of embracing alſo the intermediate rents and profits, before the eſtate ſhould be ſold; and though eſtates were not ſold, and the intermediate rents and profits are ſubjected to the ſame truſts, the Court thought themſelves at liberty under the circumſtances to give to the tenant for life the beneficial intereſt of the money; though the ſale was not actually made. The words in that will "as ſoon as conveniently may be after my deceaſe" are in effect the ſame as thoſe in this will. The firſt decree, upon the 2d of *December* 1785, ſomewhat more than a month prior to the end of a year from the death of the teſtatrix, ordered all the ſales to be made, and the money to be laid out according to the will; and declared the title of Sir *Simeon Stuart* to the intereſt of the fund to be conſtituted by the decree. The ſales being delayed, Sir *Simeon Stuart* preſented a petition to the late Lord Chancellor; inſiſting, that under the circumſtances, the general

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(*a*) The Lord Chancellor having obſerved, that the caſe ending by agreement could not be ſtated as a deciſion upon the ſubject, Mr *Romilly* ſaid, the agreement was not with reſpect to that point: as to that they took the deciſion of Lord *Thurlow*; upon which the Lord Chancellor admitted, the caſe had all the authority of a deciſion.

intention being, that he ſhould have the beneficial intereſt of the fund for his life, he ought not to be delayed in the perception of that benefit by the non-execution of the truſts; and the rents and profits of the real eſtate ought not to go to the capital, the ſales having been delayed, when that intention was clear. The principle, upon which Lord *Roſslyn* decreed, was, not taking the period of a year from the death of the teſtatrix as the period, from which the petitioner was to receive the rents and profits, making the neceſſary abatements for the intereſt of debts, *&c.*, but taking the period of the decree in 1785. The difference in time was not much: but the difference in the principle is ſomething. Lord *Roſslyn* by his order, made upon the petition and a Report of the ſtate of the funds, notwithſtanding the language of the decree was that the rents and profits till the ſale and the intereſt and dividends of the ſtock, till converted into money, ſhould go to form one fund, the intereſt of which the plaintiff was to take, conſiders the ſales as made in the view of this Court by the decree, which ordered them to be made; and, taking care to reſerve a ſufficient fund for debts and legacies, gave him the rents and profits and the intereſt of the fund unconverted from that period. Lord *Roſslyn* ſeems to think, there is a principle in the juſtice of the Court requiring him to conſider that as done, when it was ordered to be done; differing from Lord *Thurlow*, who conſidered it as ordered to be done from the death of the teſtator. Lord *Roſslyn* conſidering it as done from the date of the decree, procured by the providence of the party himſelf.

From theſe deciſions therefore it is uncertain, what is the true period in the caſe of a perſon having diſcretion enough to file a bill, and the caſe of an infant: whether the death of the teſtator, or the decree, if a ſuit was inſtituted: or, whether the Court would ſay, that was a convenient period for this purpoſe, which for other purpoſes is determined to be convenient; though it does not often hit the real juſtice of the caſe, *viz.* a year from the death of the teſtator.

The next caſe is *Entwiſtle* v. *Markland*; as to which I am clear, the Regiſter has not correctly taken the declaration of the principle of the Court as to the intereſt of the tenant for life. That declaration is not very conſiſtent; and it goes beyond the declaration of the Court. It is quite clear from the proceedings and the report, that the perſon, who got the rents and profits, though tenant for life in remainder, got the produce of property, that no diligence of the executors would have enabled them to collect and get in. The words of that will are nearly the ſame as in this. The codicil alſo brings it very near this caſe. It appeared, that ſeveral parts of the perſonal eſtate were out upon ſecurities ſuch in their nature, that though at firſt probably very convenient ſecurities, upon mortgage, they had become otherwiſe; and it was quite impoſſible that they could be got in. The terms of the will therefore connected with the evidence adverted to perſonal eſtate, directed to be got in with all convenient ſpeed, which could not poſſibly be got in; and was not left outſtanding from negligence and dilatorineſs of the executors. The principle of Lord *Roſslyn* upon that muſt have been miſtaken in the decree upon my own recollection and a compariſon of the ordering part of the decree with the declaration as to the principle. The principle of the firſt part of the declaration is obviouſly right; for if the perſonal eſtate was got in, and not applied, it was dilatorineſs; which ſhould not prejudice any one. It is inaccurate in firſt ſuppoſing all the perſonal eſtate got in, and in the latter part ſuppoſing, that only part had been got in. But upon the report it appears, not only, that great part had not been got in, but, that with no diligence it could have been got in. The claim therefore of *Robert Entwiſtle*, the firſt taker for life, was left out. But the decree afterwards goes on to order, that the plaintiff ſhall have the intereſt of that part of the perſonal eſtate. Lord *Roſslyn*'s opinion muſt have been, that the embarraſſments the ſtate of the property created made impracticable the general purpoſe, that the tenant for life ſhould have the enjoyment of the intereſt of the property; and he ſeems to have been of opinion, that he had no option. But it amounts nearly to deſtroying the natural effect of the one or the other part of the will. Lord *Roſslyn* thought, the beſt conſtruction was to further the enjoyment of the property, as the teſtator meant it.

This caſe then does not come on unprejudiced by deciſion; for under the circumſtances upon the report, the delay in receiving the money, certainly occaſioned in part by the truſtees delaying, (I deſire not to be underſtood to ſay, culpably) for three years, perhaps very wiſely, and in all inſtances forbearing to ſue upon the perſonal remedies, as well as the remedies attaching upon real eſtate, perhaps moſt wiſely for thoſe in remainder by not deſtroying the means of the debtors to pay, agreeing to take payment by ſale of the mortgagor's eſtates, and in parcels, inſtead of forecloſures, which the Court has not diſapproved, conſidering the great expence and delay of proceeding in that way, with no dilatorineſs, but upon circumſtances, which the law of this Court conſiders reaſonable grounds for delay, under all theſe circumſtances the caſes, to which I have alluded, have not left me to ſtruggle with the difficulties, that would have occurred, if this had been an original caſe, untouched by prior deciſions. Without ſaying, what my opinion would have been upon the queſtion originally, I cannot ſay, I will give the tenant for life no relief, without ſaying, the decree in *Entwiſtle* v. *Markland*, a caſe nearly in *ipſiſſimis terminis*, is wrong; that *Stuart* v. *Bruere*, which, though not ſo preciſely, is very nearly, this caſe, is wrong; and that what Lord *Thurlow* hinted to be a provident and due conſtruction of the will before him was wrong. But I think, thoſe caſes are founded upon a principle, which if the terms of the will allow you to make ſuch a conſtruction, is bottomed in evident convenience; and I lay great ſtreſs upon this; that it is the very beſt conſtruction for thoſe, who are to object to the claim of the tenant for life. This Court will look at principles of convenience. Where an eſtate is given in various legacies, and the reſidue is given, it is a rule of convenience, that authoriſes this Court to ſay, for there is no language in the will for it, that thoſe legacies ſhall be payable at the end of a year from the death of the teſtator; becauſe, as a general rule it may be taken, that the perſonal eſtate may be collected within a year; though in many inſtances that falls enormouſly to the prejudice of the reſiduary legatee. The ſame convenience has made the Court ſay, the reſiduary legatee ſhall not claim till the end of the year. In many caſes the Court ſuppoſes the reſidue to carry intereſt; though in many caſes the reſidue does not carry intereſt: but the Court takes the intereſt for a particular legatee from the reſidue, as a general rule of juſtice and convenience; though in many inſtances falling out againſt an individual. There are other caſes, before Lord *Hardwicke* upon the point, whether intereſt at 4 or 5 *per cent.* ſhall be paid upon legacies; and prior caſes in *Peere Williams:* the Court attending

The Court will look at principles of convenience; as in the rule, that legacies ſhall be payable at the end of a year.

attending to the productiveneſs of the fund, or the contrary. But now it is a general rule, that where no intereſt is given by the will, except where it is given by way of maintenance, it is only to be allowed at 4 *per cent.* from the end of the year; though it may appear to have produced in the period intereſt at 5 *per cent.* Particular juſtice is diſappointed in particular caſes: but upon this principle, alluded to by Lord *Thurlow* in *Hutcheon* v. *Mannington*, that the inquiry as to the ſtate of the perſonal eſtate, when each and every part could be got in and made productive, is endleſs and immeaſurable, the Court cuts the knot by doing what in general caſes is convenient; though in particular caſes both convenience and juſtice may be diſappointed.

In this caſe the property is large; and that circumſtance as well as the conſideration of juſtice and convenience made me heſitate: but the principle cannot be different on account of the amount of the property. The queſtion is, whether there is too much in this will to prevent me from adopting that rule of convenience, that has been adopted in the other caſes. *Entwiſtle* v. *Markland* diſpoſes of the objection from the clauſe as to accumulation of intereſt of the reſidue. That caſe alſo anſwers the objection from the power given to the truſtees to call in money, and lay it out upon intereſt, before it ſhould be laid out in land. The caſe muſt be conſidered, as if this was the only proviſion for the plaintiff; and it is to be conſidered, not only as a caſe, in which part might be got in, and part not, but as if all the perſonal eſtate was ſubject to the ſame embarraſſment; and the queſtion then is, attending to the accumulation, whether upon the whole will, conſidered upon the principles of the Court and the deciſions, the teſtator could mean, that if the property could not be cleared in the whole life of the tenant for life, the intereſt of the tenant for life was to be wholly diſappointed. We are apt to lay hold of circumſtances, though too critical, if they will aſſiſt in collecting the general purpoſe. Without ſtraining the conſtruction of the word "reſidue," though, I admit, in general it is ſuch as is contended for the defendant, there are circumſtances, which may produce accumulation, that may be taken to anſwer the direction as to that. Annuities are directed by the will to be paid out of the perſonal eſtate. By the codicil they are charged upon the land, when the perſonal eſtate ſhall be inveſted in land. It would be ſingular, that the teſtator ſhould mean the annuitants to receive their annuities before inveſtment, and that the tenant for life ſhould remain in a ſituation to get nothing. As to the legacies, ſome carrying no intereſt, others carrying intereſt, leſs perhaps than the fund might produce, there would be an accumulation of intereſt upon thoſe; and though in a ſenſe that would fall within the reach of the word "reſidue," yet he might have meant to apply the direction of the will as to accumulation more ſtrictly; and I would ſtruggle for any conſtruction rather than adopt a conſtruction, which, not from dilatorineſs of the truſtees, but only from circumſtances, to which probably the teſtator did not look, has a tendency wholly to diſappoint the intention as to the beneficial enjoyment. If the words of the will allow me, I ought to follow theſe deciſions; and the neceſſity of not following them is very much weakened by the words of thoſe wills. They have left in uncertainty the period, from which the tenant for life of the land, when purchaſed, was to commence with regard to the enjoyment of the intereſt of the perſonal eſtate, in the contemplation of this Court real eſtate, but not actually become ſo; which impoſes upon the Court conſiderable difficulty. Lord *Thurlow*'s rule is put upon the naked caſe of an eſtate directed to be ſold, no burthens upon it, &c. Lord *Roſslyn* in the firſt caſe takes the decree within the year. *Entwiſtle* v. *Markland* goes upon a rule like neither of the preceding caſes. It is not the right rule to ſay, that, where a decree is obtained, directing a truſtee to do ſome act, the time is that of the decree; for the language of the decree is no more than the language of the will. The Court orders it to be done only becauſe the teſtator has ordered it to be done. The Court cannot mean, that the decree, becauſe the money was not laid out in convenient time, is to give date to the enjoyment of the property; as if it had been laid out in convenient time. If the truſtees have not done what they ought, the Court orders it without prejudice to the intereſts of the perſons entitled, as if it had been done. In *Stuart* v. *Bruere* Lord *Roſslyn* gave the intereſt prior to the end of the year, probably, becauſe he ſaw in the report, that he could have provided for the intereſt of the debts and legacies at the time of the decree. Upon the dry caſe put in *Hutcheon* v. *Mannington* the Court had not to encumber itſelf with the payment of debts out of the produce of the eſtate, or the time neceſſary for inquiring, what debts there were. That caſe therefore does not apply to this; and upon the whole, if the Court can adopt a general rule of convenience, it muſt be, that it will act upon the enjoyment of the tenant for life at that period, when upon its own rule it ſuppoſes the purpoſes to be anſwered, before the fund can be cleared, can be anſwered; and that here it is impoſſible to ſay, the tenant for life can have the intereſt of the reſidue before the time, when the fund can be conſtituted by an inveſtment in land clear of debts, legacies, and annuities; when all thoſe can be provided for. The plaintiff therefore muſt wait one year.

The queſtion then will be, whether he is to wait longer; and if ſo, whether he muſt not of neceſſity wait, till the perſonal eſtate can be actually collected. Part may be collected from time to time in his life; and he might enjoy the rents and profits of the eſtates purchaſed with thoſe parts. But it might happen, that no part might be got in in his life. Suppoſe, theſe debts on mortgage were the only part of the perſonal eſtate: it is impoſſible to ſay, when either of thoſe funds could be realized. The Court is therefore driven either to take the end of the year upon the principle of general convenience, or to examine in each particular caſe, what convenient ſpeed and reaſonable diligence would have done: what negligence or the law of the country or other circumſtances have prevented; and make thoſe inquiries at the hazard of obtaining no clear reſult. I am therefore diſpoſed to ſay, juſtice requires, that the plaintiff ſhould have the intereſt from the end of the year; and the more ſo, becauſe I am clear, that diſtributing that juſtice to him is conſulting the eſſential intereſts of the perſons in remainder; for then from his death they will have the benefit of that, whether the fund is converted into land, or not; and if that is not done, the rule may preſs as hard upon them; and ſome of them may have no actual enjoyment of the money. Suppoſe the tenant for life ſhould call upon the truſtee to get in the money with all poſſible diligence: it would be very difficult for the truſtee in many caſes at his own riſk to determine, that he would not take all the remedies competent to him; and unleſs by this ſort of equalizing rule, if I may call it ſo, we give a diſcretion to the truſtees to make a huſband-like management, the tenant for life might inſiſt upon a bill being filed; or enter upon the eſtate; or he might arreſt the mortgagor; or bring actions of covenant. The truſtee might ſay to the tenant for life, he would not put the property in riſk: but he would be bound upon an inquiry in this Court to ſhew a ſolid reaſon for objecting to the proceeding. The conſequence would be in every inſtance an inquiry, whether the truſtee acted reaſonably, or not. What a waſte of property diſputes ariſing out of ſuch circumſtances would occaſion; even if the property ſhould be eventually got in: but we know, ſecurities are put in great hazard by too much preſſure; and theſe conſiderations lead me to think, there is a ſtrong analogy in the general rule; which in many inſtances is not applicable to particular circumſtances; and I am juſtified upon the whole, though I have had great difficulty upon it, in ſaying, the conſtruction ought to be that, which will give the tenant for life the intereſt from the period, at which in the contemplation of this Court the reſidue would be formed as reſidue; *viz.* the end of the year, conceiving it hard upon him to take the time of the decree; recollecting, that the former decree directs an inquiry, as to what had been done, without directing the money to be called in; which certainly it ought upon that principle.

The directions muſt be ſuch as to provide for an appropriation as to legacies and annuities: as to legacies, both ſuch as carry intereſt leſs than 5 *per cent.*, and ſuch as carry no intereſt till the time of payment. In the appropriation as to legacies it would be fit to conſider, whether the neceſſity of appropriating may not give the legatees a larger intereſt than is given by the will, upon *Green* v. *Pigot* (*a*): but there have been other caſes ſince, in which it has been held not to be the legitimate effect of appropriation to give a larger intereſt, than if there was no appropriation.

The ſecond point is, whether the legatees are entitled to more than 4 *per cent.*; and particularly one, who had taken a mortgage for his legacy. As to the general point I have taken it to be clearly ſettled, that, where no rate of intereſt is given by the will, the Court gives 4 *per cent.*; and where any rate of intereſt is directed by the will, the Court gives that; and there is no reaſon from particular circumſtances to depart from the general rule as

(*a*) 1 *Bro. C. C.* 103.

to legatees. The caſes cited from *Veſey* ſhew, that it was not at that time a ſettled rule, whether there ſhould be 4 or 5 *per cent.*; but that it was rather the inclination of the Court to give 5, as to perſonal eſtate, particularly if producing intereſt. But that rule, I take it, has been long altered; and the general rule is, as I have ſtated. One caſe (*a*), that was cited, does not bear upon it: a perſon charging under a power had given 5 *per cent.*; and the Court ſaid, he might, if he did not give more than legal intereſt.

As to the tranſaction of the mortgage, there is no doubt, *Francis Sitwell*, when of age, might take payment of his legacy by a mortgage, if he thought proper; and feeling, that it would be attended with inconvenience, might make a bargain, that, when the eſtate ſhould produce money enough to pay him, they ſhould take it back again. That ſeems to be the agreement. I underſtand, he will not take finally to the mortgage; and, if not, the tranſaction is undone; and he puts himſelf back to the ſituation of legatee; and then in the account he muſt give credit for the difference between 4 and 5 *per cent.* received in the mean time. If he holds to the mortgage, it is ſo much payment; and he will keep the 5 *per cent.*

(*a*) *Lewis* v. *Freke, ante*, vol. 2. 507.

Dec. 5.

PERRY *v.* WHITEHEAD.

The want of a ſurrender of copyhold eſtate cannot be ſupplied for grandchildren.

Catherine Whitehead by her will, dated the 3d of *June* 1798, made the following diſpoſition:

"I give, deviſe and bequeath, all my freehold and copyhold "houſes, meſſuages, lands, tenements and hereditaments, what"ſoever in *London* and whereſoever ſituate and being with their "and every of their appurtenances unto my two executors here"inafter named, to be by them ſold and diſpoſed of or divided at "their own will and diſcretion; after which I give one ſhare or "third part of the ſame unto my five nieces, *Catherine*, *Anne*, "*Fanny*, *Charlotte*, and *Harriet*, the children of my late daughter "*Perry* of *Newport*, ſhare and ſhare alike, their heirs, executors,

"and

1801.

Perry *v.* Whitehead.

"and aſſigns; and if any of the ſaid nieces ſhould happen to "die before the day of marriage and before they arrive at the age "of twenty-one years, then I will and deſire, that ſuch fifth part "bequeathed to her ſo dying ſhall be equally divided among the "ſurviving nieces ſhare and ſhare alike."

The teſtatrix appointed her daughters *Conſtantia Skynner Whitehead* and *Fanny Whitehead*, her executrixes. She died in *May* 1799; leaving her five grand-daughters by her deceaſed daughter, deſcribed in the will as her nieces, and their two brothers *John Perry* and *James Perry*, ſurviving: her coheirs at law, *viz.* her two ſurviving daughters and her two grandſons being alſo heirs according to the cuſtom of the manor; and the copyhold premiſes not having been ſurrendered to the uſe of the will.

The bill was filed by the five grand-daughters; charging, that the copyhold premiſes having been ſurrendered by the teſtatrix upon mortgage, no ſurrender was neceſſary to the uſe of her will; the legal eſtate not being in her; and that if a ſurrender was neceſſary, the want of it ought to be ſupplied in equity. The bill therefore prayed, that the plaintiffs may be declared entitled to one-third part of the copyhold premiſes; and that if the Court ſhould be of opinion, that a ſurrender was neceſſary to give effect to the deviſe, the want of the ſurrender may be ſupplied.

The defendants, the daughters and grandſons of the teſtatrix, by their anſwer ſtated, that the mortgage had been paid off by the teſtatrix, that the premiſes were ſurrendered to the uſe of the mortgagee and his heirs, ſubject to redemption; and at the ſame Court, ſubject to the ſaid mortgage ſurrender, they were ſurrendered to the uſe of the teſtatrix and her huſband during their lives and the life of the ſurvivor; and after the deceaſe of the ſurvivor to the uſe of the heirs and aſſigns of the ſurvivor; and the teſtatrix ſurvived her huſband. They farther ſtated, that the mortgagee never was admitted; and the legal eſtate was veſted in the teſtatrix until her death; and deſcended. They inſiſted, that a ſurrender to the uſe of the will was neceſſary to effectuate the deviſe; and that the plaintiffs, being merely the grand-children of the teſtatrix, are not entitled to have the defect of ſurrender ſupplied to the prejudice of the defendants, as heirs at law; eſpecially as two of the defendants are the daughters of the teſtatrix, and the other defendants are totally unprovided for, except that *John Perry* is entitled to the fee ſimple of two ſmall houſes, which deſcended to him as heir at law of his father, and a moiety of a freehold meſſuage, left to him by the will of his grandfather, of the annual value of 19*l.* in the whole, and alſo, that *James Perry* is entitled to the fee ſimple of the other moiety of the laſt mentioned meſſuage, but to no other real or perſonal eſtate.

Mr. Mansfield, Mr. Richards, and Mr. Fonblanque, for the plaintiffs—The relief ſought by this bill is certainly contrary to what has been conſidered a general rule of the Court ſince the final deciſion of *Kettle* v. *Townſend* (*a*), in the time of King *William*: Lord *Somers*'s decree in favour of a grandſon being reverſed by the Houſe of Lords. But in later caſes different Judges have expreſſed an opinion, that the point deſerved to be reconſidered. In *Chapman* v. *Gibſon* (*b*) Lord *Alvanley* went much at large into the ſubject; and ſaid, he did not ſee, why a grand-child ſhould not have the ſame equity; for the ſtatute of *Elizabeth* (*c*) has made it compulſory on a grandfather to provide for him. Lord *Roſslyn* alſo in *Hills* v. *Downton* (*d*) expreſſed a ſtrong opinion againſt the deciſion of the Houſe of Lords. The ground, that a grandfather is not bound to provide for his grand-child, as a father is for his child, and the former therefore is not under the ſame moral obligation, would ſound extraordinary out of a Court of Judicature; and certainly affords no reaſon. The ſtatute of *Elizabeth* impoſes the ſame obligation upon a grandfather and grandmother as upon the parents; which is the ſenſe of the Legiſlature and of mankind. There is no other deciſion againſt a grandchild. There is a caſe the other way (*e*) prior to that in the Houſe of Lords. The opinion of the Maſter of the Rolls in *Watts* v. *Bullas* (*f*) is deciſive in favour of grandchildren; and in *Furſaker* v. *Robinſon* (*g*) Lord *Cooper* doubted the caſe of *Kettle* v. *Townſend*.

No intereſt by way of maintenance upon a legacy ſimply to a grandchild or a natural child.

Lord CHANCELLOR—Where a legacy is given to a grandchild, without more, would that grandchild take intereſt, as a child

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(*a*) 1 *Salk.* 187.

(*b*) 3 *Bro. C. C.* 229.

(*c*) Stat. 43 *Eliz. c.* 2. *ſ.* 7.

(*d*) *Ante*, vol. 5. 557, ſee page 565.

(*e*) *Anon.* 2 *Freem* 197.

(*f*) 1 *P. Will.* 60.

(*g*) *Pre. Ch.* 475. 1 *Eq. Ca. Ab.* 123. *Pl.* 9.

would? In the caſe of a grandchild muſt there not be ſomething more than merely giving a legacy; ſomething, ſhewing, that the teſtator put himſelf *in loco parentis*? Is there any caſe for that in favour of a natural child, ſimply upon a legacy, without any thing to ſhew, the teſtator put himſelf *in loco parentis*? In *Grave* v. *Lord Saliſbury* (*a*) Lord *Thurlow* would not in the caſe of a natural child ſay, a legacy was adeemed by an advancement.

The difficulty with me is this: can I ſitting here contradict a deciſion of the Houſe of Lords?

For the plaintiffs—*Furſaker* v. *Robinſon* was the caſe of a natural child: but the point as to maintenance has ſince been conſidered in *Crickett* v. *Dolby* (*b*), and an opinion expreſſed by Lord *Alvanley* in favour of the natural child. This teſtatrix certainly meant to put herſelf *in loco parentis*. As to the queſtion, whether the children are provided for, that underwent great conſideration in *Hills* v. *Downton*; and Lord *Roſslyn* thought, as Lord *Hardwicke* thought before, that circumſtance ought not to weigh.

In many inſtances the Courts below have conſidered themſelves at liberty to depart from a deciſion of the Houſe of Lords upon very minute circumſtances. Lord *Thurlow* did ſo in *Tweddell* v. *Tweddell* (*c*); and ſo are all the caſes upon general bonds of reſignation (*d*).

Mr. *Romilly* for the defendants was ſtopped by the Court.

Lord CHANCELLOR—I feel great difficulty in hearing this cauſe. The queſtion with me, adopting all the ſentiments of the great perſons named, as far as they go, with due ſubmiſſion to that Court, which has a right to bind me and them, is, whether I can ſet up my judgment againſt a judgment of the Houſe of Lords. A rule of law laid down by the Houſe of Lords cannot be reverſed by the Chancellor; though if there is any difference from a circumſtance, that was not before the Houſe of Lords, the cauſe may be decided upon that.

(*a*) 1 *Bro. C. C.* 425. (*b*) *Ante*, vol. 3. 10. (*c*) 2. *Bro. C. C.* 101. 152.]

(*d*) See the *Biſhop of London* v. *Fytche*, 1 *Bro. C. C.* 96.

It is ſaid, the grandmother put herſelf *in loco parentis*. But it appears, there are other grandchildren, to whom ſhe forgot her duty; and who are unprovided for. The caſe of a grandchild, where the father is alive, and abundantly providing for it, is very different from the caſe, where the father is dead. As to the ſtatute of *Elizabeth*, if the father is living, the grandfather is under no legal obligation. The rule of law muſt remain, till altered by the Houſe of Lords. Therefore diſmiſs the bill: but it is impoſſible to give coſts; where the plaintiffs have had ſo much encouragement from *dicta*.

Rolls.
Dec. 1, 2. 7.

SPURRIER *v.* FITZGERALD.

A bill alleging a written agreement may be ſuſtained by evidence of a parol agreement.

After anſwer admitting an agreement, and ſubmitting to perform it, the bill being amended as to other circumſtances, the defendant was not permitted to take advantage of the Statute of Frauds by the anſwer to the amended bill; and a ſpecific performance was decreed.

The bill ſtated, that the plaintiff was poſſeſſed of a meſſuage, coach-houſe, ſtables, and buildings, ſituate at the corner of lower *Seymour* ſtreet and *Orchard* ſtreet, and in *Calmel*'s mews, in the pariſh of *St. Mary le bone*, for two ſeveral terms of years; and being deſirous to ſell the ſame for the remainder of the ſaid terms reſpectively, the defendant contracted with him for the ſame; and ſhe the defendant by writing under her own hand agreed to give the plaintiff the ſum of 1,800*l.* for the ſaid meſſuage, coach-houſe, ſtables, &c., for the reſidue of the ſaid terms reſpectively, and the fixtures; and the plaintiff agreed to ſell the ſaid meſſuage, coach-houſe, ſtables, &c. and fixtures at and for that ſum; and which ſaid ſum of 1,800*l.* the ſaid defendant agreed to pay the plaintiff, as follows: that is to ſay, the ſum of 900*l.* down, and the remainder thereof in two years, and to give the plaintiff her bond for ſecuring the payment thereof; and the plaintiff refers to the agreement or writing in the plaintiff's cuſtody. The prayer of the bill was, that the ſaid agreement, ſo as aforeſaid made by the ſaid defendant with the plaintiff, may be ſpecifically performed, &c.

The defendant by her anſwer, ſtating the plaintiff's intereſt in the premiſes for two ſeveral terms of eighty-four years and ſeventy-five years and a half, admitted, that ſhe contracted for the ſame with Mr. *Phipps*; to whom the plaintiff by a letter, dated the 30th of *April* 1800, referred her, as his agent, to treat on his part for the ſale thereof. She ſtated, that ſhe contracted reſpecting the ſame verbally, but not in writing under her own hand or ſigned by her. She verbally agreed to give the plaintiff the ſum of 1,800*l.* for the ſaid premiſes for the reſidue of the terms and for the fixtures; and admits, the plaintiff, or *Phipps* as his agent, agreed to ſell the ſame to her for that ſum, payable by inſtalments, as ſtated in the bill.

The anſwer then ſtated the objections to the abſtract: 1ſt, upon covenants in the original leaſe and aſſignments againſt exerciſing certain trades upon the premiſes under a penalty by way of additional rent, and againſt erecting any portico, bow window, or other projection, or fixing any ſign or other poſt before the front of the houſe, which ſhould project farther than the window ſtools and door caſes, without conſent in writing; by the effect of which covenant ſhe conceived ſhe ſhould be prevented from erecting a balcony: 2dly, that the coach-houſe and ſtables were ſubject to higher ground rents than had been repreſented. The defendant then ſtating ſome farther objections denies, that ſhe made any of the ſaid objections in order to evade or delay the performance of the ſaid verbal agreement: on the contrary the defendant ſays, ſhe is now and always has been ready and willing to perform her part of the ſaid verbal agreement on having a good title and proper conveyance made to her or her truſtees of the ſaid meſſuage or tenement, coach-houſe, ſtables, and premiſes, ſubject to the ground rents only to the amount of 19*l.* 16*s.* *per annum*, and on having the proper conſent in writing from the ſeveral perſons, who ought to give the ſame to the erection of the ſaid balcony, or a proper indemnity againſt any other incumbrances. This ſubmiſſion was ſeveral times repeated in nearly the ſame terms.

The bill being amended as to the circumſtances of the plaintiff's conduct, to which the anſwer attributed the delay in executing the agreement, charging, that the proper conſents to the erection of the balcony had been procured, *&c.*, and praying, that the defendant may be decreed to make the plaintiff compenſation for the loſs and expence occaſioned by her not performing the agreement, the defendant by her farther anſwer ſtated, that ſhe

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PERRY
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WHITEHEAD.

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The anſwer then ſtated the Statute of Frauds (*a*), with the uſual averment, that neither ſhe nor any perſon for her ever ſigned any contract or agreement in writing for purchaſing the ſaid premiſes; and that the defendant hopes, ſhe ſhall have the ſame benefit of the ſaid Act (if neceſſary) as if ſhe had pleaded it.

The plaintiff produced evidence, that he had procured the proper conſents for the erection of the balcony; and it was proved, and admitted by the anſwer, that ſome of the other objections had been obviated by the plaintiff.

Mr. Piggott and Mr. Stanley for the plaintiff inſiſted, that the defendant having by her firſt anſwer ſubmitted to perform the agreement cannot afterwards by a farther anſwer inſiſt upon the Statute of Frauds.

Mr. Richards, Mr. Romilly, and Mr. W. Agar for the defendant objected to reading the anſwer, or any evidence, to prove any thing but a written agreement according to the frame of the bill.

This is a very conſiderable queſtion. The plaintiff muſt prove his caſe, as he ſtates it. Having by his firſt bill induced the defendant to make an admiſſion, he cannot by accommodating his amended bill to the anſwer ſtate a different caſe and pray a different relief. This is an attempt to go beyond the caſe, frequently referred to, where, the anſwer ſtating an agreement, the bill by amendment adopted that agreement. In *M'George* v. *Frankland*, lately before the Lord Chancellor, the bill prayed ſpe-

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(*a*) 29 *Char.* 2. *c.* 3.

cific performance of an agreement. The defendant ſtated, that the agreement was abandoned; and produced letters of the plaintiff, expreſſing, that he conſidered it at an end. The plaintiff offered evidence of acts, ſhewing an intention to conſider it binding; and that the defendant attended at a ſale by auction; and ſaid, the premiſes were under contract to him; inſiſting, that being in the anſwer it was put in iſſue. The Lord Chancellor admitted the evidence *de bene eſſe;* but afterwards ſaid, it ought not to be admitted, not being in iſſue in the cauſe; and that if the plaintiff goes on ſuch a caſe, he ought to ſtate it. In *Legh* v. *Haverfield* (*a*) the bill was diſmiſſed, becauſe the agreement proved was not that alleged. *Mortimer* v. *Orchard* (*b*) and many other caſes are uniform, that the plaintiff muſt prove the agreement ſtated; or he ſhall not have a decree. Upon this bill therefore no agreement can be read, except an agreement in writing, and properly ſtamped.

For the plaintiff—In this objection the diſtinction between the agreement alleged and the evidence of it is not attended to. The allegation of the bill is, that the agreement is evidenced by writing. The objection is premature. The Court muſt firſt hear the anſwer, before the confeſſion in the anſwer can be compared with the ſtatement of the bill. This is very different from the caſes alluded to; in which the agreements alleged and admitted were different: the bill praying performance, not of the agreement admitted, but of another agreement. The agreement confeſſed here is the agreement ſtated; and the only difference is in the manner, in which it is evidenced.

The Maſter of the Rolls obſerving, that the objection led prematurely to the merits of the cauſe, the evidence was read without prejudice.

For the defendant—The bill ſtates, and in all its parts applies to, a written agreement. The plaintiff has therefore made it abſolutely neceſſary to produce ſuch an agreement; and he cannot go upon any other. In the paſſage referring to the agreement

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(*a*) *Ante*, vol. 5. 452.

(*b*) *Ante*, vol. 2. 243.

or writing in the plaintiff's cuſtody it is impoſſible to ſeparate the ſentence, or to take advantage of the word "or;" for he cannot refer to a verbal agreement in his poſſeſſion. The plaintiff now deſires the Court to perform, not the agreement he ſtates, but a verbal agreement ſtated by the anſwer.

With reſpect to the point upon the Statute of Frauds, though there is no caſe, in which it has been preciſely ſettled, it is now underſtood upon the ſtrong opinion of Lord Chief Juſtice *Eyre* and Lord *Roſslyn*, and of the preſent Lord Chancellor in the late caſe of *Cooth* v. *Jackſon* (*a*), that a defendant admitting an agreement, but inſiſting upon the benefit of the Statute by his anſwer, ſhall not be compelled to perform it. If the terms of the agreement are admitted, whether the defendant ſubmits to perform it, or not, all danger of perjury is out of the queſtion. The ſubmiſſion to perform the agreement therefore does not vary the caſe. It was at a certain time; and when the plaintiff ſtated certain terms, with which he ſaid, he would be ſatisfied. When the defendant ſaid, ſhe was ready to perform that agreement, ſeeing what the plaintiff prayed, he ought to have cloſed with that; and to have replied to the anſwer, and ſet down the cauſe. Inſtead of that, amending the bill, making a new caſe, and requiring another anſwer, he has entirely waived that ſubmiſſion; which was made upon a caſe different from that now ſtated. This would be manifeſt injuſtice. The plaintiff now claims a compenſation for the delay and the expence of repairing the injury to the houſe; upon the ground, that ſhe bound herſelf to perform the agreement. If that had been ſtated originally, would ſhe have ſubmitted to perform the agreement? The time is alſo material. This defendant has loſt her object of a reſidence in town for one winter. Though at that time ſhe was ready to take the houſe, yet now, nine months afterwards, when it is deteriorated, and a bill filed, ſhe inſiſts, ſhe ſhall not be compelled. The whole anſwer is to be taken together, as one Record. She takes the defence the law gives her; and of which ſhe has a right to avail herſelf againſt a new caſe. The amended bill is entirely a new bill; and the anſwer is conſidered an anſwer to a new bill. In *Moore*

(*a*) *Ante*, 12.; where the ſubject is fully diſcuſſed, and the authorities referrd to. See alſo the note, *ante*, vol. 3. 39, 40. to *Pym* v. *Blacburn*.

v. *Edwards* (a) there were two anſwers: but Lord *Roſſlyn* was of opinion, that the defendant might have the benefit of the Statute, if inſiſted upon by the ſecond anſwer.

Mr. Piggott in reply—This is not a caſe of different agreements: nor is the agreement originally ſtated in any degree varied by the amendments. The Court is left in no doubt as to the nature, effect, or terms, of the agreement. The opinion expreſſed by the Lord Chancellor has not been acted upon; and the point cannot be conſidered as decided. But, ſuppoſing that to be ſo, the benefit of the Statute muſt be taken at the time the agreement is confeſſed; for if the party ſubmits to perform it, upon the ſame authority there is an end of the Statute. The agreement, of which the plaintiff aſks the performance, is that, which the defendant admits, and ſubmits to perform: no other. The bill was filed on the 2d of *July* 1800. On the 17th of *November* 1800 the defendant put in that anſwer, admitting the agreement, as ſtated by the plaintiff; denying only the form of it; namely, that it was evidenced by writing; and ſhe ſubmits to perform it. If ſhe was then at liberty to object to the form of the agreement, namely, by parol, as a reaſon, why ſhe was not bound to perform it, it was incumbent upon her then to claim the benefit of the Statute: but ſhe does not. On the contrary ſhe ſubmits to perform it; and inſiſts, that it was owing to the plaintiff, that it was not performed without the bill. The amendments had nothing to do with the agreement. They were made neceſſary by the defendant's ſtating circumſtances to ſhew, that it was the plaintiff's fault, that the agreement was not performed by her. By the anſwer to thoſe amendments, put in not till *March* 1801, ſhe for the firſt time claimed the benefit of the Statute. This was a fraud on the plaintiff: for up to that time the plaintiff could not but conſider the agreement as a ſubſiſting agreement, binding him, and binding the premiſes. At any rate it was entirely miſleading him; for if the defendant had, when ſhe confeſſed the agreement, inſiſted on the Statute, the plaintiff would have been at liberty to conſider his bill as at an end, and himſelf and the premiſes contracted for as diſcharged from the agreement. On the contrary the firſt anſwer leads him to conclude, that it is a ſubſiſting agreement; and reduces the cauſe to a mere queſtion, by whoſe fault the agreement

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(a) *Ante*, vol. 4. 23.

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had not been performed; and the authority of the Court to enforce it had been rendered neceſſary. The plaintiff proceeded in his cauſe to clear that queſtion; and till almoſt a year after the agreement was entered into, and the bill filed, the plaintiff is led by the pleadings to treat it as a ſubſiſting agreement; and is never told by the defendant, that it was an agreement, as to which, though ſhe admitted the ſubſtance of it in all particulars, ſhe nevertheleſs meant to avail herſelf of the form as a reaſon for refuſing to execute.

Dec. 7.

The Maſter of the Rolls—This bill is filed for the ſpecific performance of an agreement. The defendant by her anſwer admits a parol agreement; and ſubmits to have it carried into execution: but ſhe now contends, that a ſpecific performance of that agreement ought not to be decreed: 1ſt, becauſe the plaintiff having by his bill ſtated an agreement in writing ought not to be permitted either by reading the anſwer or by other evidence to prove a parol agreement: 2dly, if he ſhould be permitted to prove a parol agreement, yet the defendant is at liberty to inſiſt upon the benefit of the Statute of Frauds; as ſhe has by her anſwer to the amended bill, notwithſtanding her ſubmiſſion to perform it by the anſwer to the original bill. As to the firſt point, it is a little ambiguous upon the face of the bill, whether the plaintiff did or did not mean to ſtate this to be a written agreement. It ſeems, he meant in the firſt place to repreſent a contract, without ſaying, whether it was in writing, or not; and then, that ſome of the terms were expreſſed in writing, ſigned by the defendant. But taking it, that he meant to repreſent the whole to have been in writing, I take it not to have been ever eſtabliſhed, that a plaintiff is bound to prove all the allegations of his bill with ſo much ſtrictneſs and preciſion as a plaintiff at law is obliged to prove his declaration: it is ſufficient, if a plaintiff here proves the ſubſtance of his bill. He cannot certainly have a decree for the execution of a different ſort of agreement from that laid; an agreement of a different import or tendency; for then the evidence would not ſupport the bill. But the difference between a written and a parol agreement conſiſts in the mode, in which they are evidenced. This objection does not at all depend upon the Statute of Frauds. The objection, provided it is an objection at all, would have been equally good, SPURRIER *v.* FITZGERALD.

good, if no ſuch ſtatute had been made; that the plaintiff ought to prove the allegation, not only in ſubſtance, but all its circumſtances; that evidence of a written agreement will not ſupport the allegation of a parol agreement; or evidence of a parol agreement the allegation of a written agreement. No ſuch rule was ever eſtabliſhed. At Law it is even now ſufficient, as it was before the Statute, to allege an agreement generally; which throws it upon the defendant to allege, that it is not in writing. In *Whitchurch* v. *Bevis* (*a*) Lord *Thurlow* ſtating the caſe of *Child* v. *Lord Godolphin* conſiders the allegation of the agreement being in writing to be thrown into the bill for the mere purpoſe of forcing the defendant to plead the Statute inſtead of demurring; and it ſeems, there the allegation was of a written agreement; to which the defendant pleaded, that there was no written agreement. Lord *Thurlow* ſays, " That plea was ordered to ſtand for " an anſwer, with liberty to except; and upon a rehearing ob- " tained by the defendant the order was confirmed; and Lord " *Macclesfield* ſaid, the plea of the Statute was right; but that ſhe " ought to have denied the agreement by anſwer; for if ſhe con- " feſſed it, the Court would enforce it; that if the bill had ſtated " the agreement generally, a demurrer might have been allowed: " but where the agreement is ſtated to be in writing, the plea " muſt be ſupported by the anſwer (*b*)."

That ſhews, that, if the plaintiff alleges a written agreement, the defendant will be reduced to the neceſſity of pleading, and ſupporting the plea by an anſwer; which would not be neceſſary, if this objection would hold; for the defendant would run no riſk; as according to this the plaintiff could not have performance of the agreement in any way; having alleged it to be in writing.

The next head of defence, that the defendant, having by the anſwer to the amended bill claimed the benefit of the Statute, is in the ſame condition, as if ſhe had originally inſiſted upon the Statute, raiſes to the queſtion ſo often agitated; whether, if the defendant confeſſes the agreement, but at the ſame time inſiſts upon the Statute, he ſhall be compelled to perform it. But this defendant does not bring it to that queſtion; for having once ſub-

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(*a*) 2 *Bro. C. C.* 559.

(*b*) 2 *Bro. C. C.* 566.

mitted to perform the agreement, it is impoſſible for her afterwards to inſiſt upon the Statute. At the time ſhe confeſſed the agreement ſhe ought to have interpoſed that guard. At that time it was incumbent upon her to ſay, whether ſhe would avail herſelf of it. The reaſon ſhe alleges, that the plaintiff did not think fit to be ſatisfied with her anſwer, but amended his bill, and required a farther anſwer as to the details and circumſtances, is no reaſon for withdrawing her ſubmiſſion. It is well known, that it is with great difficulty permitted to a defendant to make any alteration in his anſwer, even upon a miſtake; as where an executor by miſtake ſubmitted to account for the reſidue to the next of kin; and afterwards diſcovering his right upon ſome late caſes to inſiſt upon having it beneficially appealed: yet the Court refuſed to permit him to withdraw that ſubmiſſion. What ground is there here for withdrawing a ſubmiſſion deliberately made? The plaintiff did not amend his bill for the purpoſe of obliging her to confeſs a new or a different agreement. He was contented with her anſwer as to that; but wiſhed to put himſelf in a better plight as to her allegation of non-performance upon his part; and that it was his own fault, that the agreement was not performed without the neceſſity of a ſuit. The agreement was out of the queſtion. It was at reſt between them. There was an agreement, and a ſubmiſſion to perform it; and the only queſtion between them was as to the coſts of this ſuit, whether it was neceſſary.

The defendant having therefore ſubmitted to perform the agreement confeſſed by her, it is of courſe to decree her to perform it; and all the other circumſtances are merely as to the coſts, ſuch as may influence the Court as to the payment of them, upon the point, whether it was neceſſary for the plaintiff to inſtitute this ſuit; or, whether it was his fault, that the agreement was not performed. But it is mere matter of courſe to decree a performance.

At the defendant's deſire a reference to the Maſter was directed as to the title; and whether the proper conſents were obtained as to the erection of the balcony.

TURNER *v.* MOOR.

Rolls.
Dec. 7.

Legacy to *A.* or in caſe of his death to his iſſue, abſolute in the parent.

JOHN CANTLEY by his will, dated the 2d of *April* 1796, gave and bequeathed to *John Turner* and *Robert Turner* all his leaſehold meſſuages, lands, tenements, and premiſes, in the county of *Cornwall*, to hold to them, their executors, *&c.* as tenants in common and not as joint tenants, for the reſidue of the reſpective terms. The will then proceeded thus:

"Being poſſeſſed at this preſent time of property in the na-" "tional funds, to wit, to the amount of 15,000 *l.* of ſtock in" "the 3 *per cent.* Conſolidated Annuities, I hereby leave and be-" "queath the ſaid 15,000 *l.* of ſaid ſtock to my nephew Mr." "*Robert Dalrymple* now or lately reſiding in *India* or in caſe of" "his death to his lawful iſſue: but if my ſaid nephew ſhould be" "deceaſed at the time of my death without leaving any lawful" "iſſue, then and in that caſe I leave and bequeath to the afore-" "ſaid *John Turner* of *Turner-hall*, or in caſe of his deceaſe to his" "lawful iſſue 3000 *l.* of the ſaid ſtock. Alſo in like manner I" "leave and bequeath 3,000 *l.* of ſaid ſtock to the aforeſaid *Ro-*" "*bert Turner* of *Menie* or his lawful iſſue. Alſo in like manner" "I leave and bequeath 6,000 *l.* of the ſaid ſtock to my couſin" "Captain *M'Naughtane Ramſay*, mariner, now or lately reſiding" "in the town of *Leith* near *Edinburgh*, or in caſe of his death" "to his lawful iſſue."

Upon the bill of *John* and *Robert Turner* and *Ramſay* againſt the executors, the decree directed an inquiry, whether *Robert Dalrymple* or any of his iſſue were living at the death of the teſtator.

The Maſter by his report ſtated his opinion, that *Dalrymple* not having been heard of ſince the time of his ſailing on a voyage in *India* on the 22d of *December* 1785 muſt in all human probability have periſhed in the proſecution of that voyage, being many years before the death of the teſtator; and no evidence having been proved to ſhew, that he ever was married, but the contrary appearing by the evidence, he conceived, he never was married.

The

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The cauſe coming on for farther directions, the Maſter of the Rolls directed a petition to be preſented on behalf of the children of the plaintiffs, ſome of whom had attained the age of twenty-one. The petition ſuggeſting, that the plaintiffs are entitled only to the intereſt of the legacies reſpectively, and that the principal of ſuch legacies upon their reſpective deaths became diſtributable among the iſſue of the plaintiffs reſpectively, who may be living at the time they may reſpectively die, prayed, that the legacies may be ſecured.

Mr. Martin in ſupport of the petition—Upon the wording of this will and the circumſtances a life intereſt only was intended for the perſons named in the will. That conſtruction alſo muſt prevail upon the legal import of the words according to the deciſions. If the will had ſtopped after the diſpoſition to *Robert Dalrymple*, he could have had no more than a life intereſt: but knowing the circumſtances as to that nephew, the will being made eleven years after he had ſailed on a voyage, in which in all probability he periſhed, the teſtator adds words, ſhewing, he meant to guard againſt the event of the deceaſe of his nephew in his life. He was clearly aware of the import of the words he was uſing. If he had the ſame event in his view as to the other perſons, he would have inſerted ſimilar words after each particular bequeſt: but that being omitted, the will ſtands, as if the words applied to *Robert Dalrymple* had never been introduced.

There have been various caſes, upon words, in ſome preciſely ſimilar, in others nearly ſo; which have been conſidered as curtailing the intereſt of the firſt taker to a mere intereſt for life: *Billings* v. *Sandom* (a); which from a fuller manuſcript note appears to be accurately reported, as far as it goes: *Nowlan* v. *Nelligan* (b): *Lord Douglas* v. *Chalmer* (c), determined in a great meaſure upon the authority of *Billings* v. *Sandom*. The Court has uniformly held it a life intereſt only upon ſuch words. The words uſed in this will are words of purchaſe; and if this had been a deviſe of land, the parent would have had an eſtate for life only, not an eſtate tail; which has afforded the ground, upon which the Court has gone in theſe caſes. Upon the other conſtruction the Court muſt ſupply words; which is never done without a manifeſt intention. Suppoſing, the intention was to give the parent an abſolute intereſt, the rule "*Quod voluit non dixit*," applies.

(a) 1 *Bro. C. C.* 393.

(b) 1 *Bro. C. C.* 489.

(c) *Ante*, vol. 2. 501. *Hinckley* v. *Simmonds*, *ante*, vol. 4. 160. *King* v. *Taylor*, *ante*, vol. 5. 806.

Mr. *Romilly* for the plaintiffs was ſtopped by the Court.

The Maſter of the Rolls—My recollection of the caſe of *Lord Douglas* v. *Chalmer* induced me to expreſs a wiſh, that the conſtruction of this will ſhould be a little farther conſidered. But that caſe is very clearly different. Firſt, it is quite clear here, the intention was, that if the teſtator's nephew *Robert Dalrymple* ſhould be living at his death, he ſhould take abſolutely, and his children ſhould take nothing. The reaſon aſſigned for the teſtator expreſſing himſelf with more particularity as to him, his abſence in *India*, and the uncertainty, whether he was not dead, furniſhes no reaſon for giving him upon the ſuppoſition, that he was alive, a larger intereſt than any other legatee; and it is clear, that, if he was alive, the teſtator intended him to take the whole, and that the children ſhould take nothing. That gives the rule for the conſtruction of the ſame words, when occurring again in other parts of the will. The ſame phraſe is repeated after the bequeſt to each of the other legatees; and having himſelf clearly expounded his meaning in one inſtance he muſt be ſuppoſed to have the ſame meaning by the ſame words in the other parts. The caſe I have mentioned is different from this in another reſpect. That was a bequeſt to a married woman. The mention of the iſſue clearly implied, that he did not intend an abſolute legacy to her; which in effect would have been a legacy to her huſband. The Lord Chancellor therefore proceeded a good deal upon the apparent intention of the teſtatrix; not meaning an abſolute gift to the huſband, but a proviſion for the wife and children. There alſo the word was "and;" which was relied on in *Billings* v. *Sandom*; as ſhewing, that both parties are to take a benefit, the parent and the children. The words cannot be fully ſatisfied without giving each ſome intereſt; which can be only by giving an eſtate for life to the parent and the capital to the children after the death of the parent. Here the word is "or." Both are not to take: but either the parent or the children in the alternative;

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"Or" conſtrued "and:" the intention requiring it.

and though in many caſes "or," has been conſtrued "and," you muſt ſhew an intention requiring that (a). The natural import is to exclude the one from any participation of that, which is given to the other.

I have not the leaſt doubt therefore upon this will, though I wiſhed it to undergo a little farther conſideration, that it was not neceſſary to make the children parties. The prayer of the petition being refuſed, the directions are of courſe.

(a) *Weddell* v. *Mundy*, *ante*, 341. *Maberly* v. *Strode*, *ante*, vol. 3. 450. and the references in the note, 452.

Dec. 11.

SMART *v.* PRUJEAN.

Legacies out of real eſtate, given by an unatteſted paper, cannot ſtand, unleſs that paper is clearly referred to by a will duly executed; ſo as to be incorporated with it: in this inſtance there being no ſuch clear reference upon the contents of the inſtrument, the legacies failed: the circumſtance, that a paper was found incloſed in the ſame cover with the will, indorſed as his will, not being ſufficient.

ANTHONY LOWE, a *Roman* Catholic prieſt, of *Gravelines* in *Flanders*, being ſeiſed in fee of ſome real eſtates in *England*, by his will, dated the 5th of *December* 1789, duly atteſted according to the Statute of Frauds (*a*), gave and deviſed to *John Prujean* and his ſon, their heirs and aſſigns, his real eſtates, deſcribing them; upon truſt, that immediately and as ſoon as conveniently might be after his deceaſe they ſhould ſell the ſame; and in the mean time and until the ſale apply the rents and profits, after deducting their coſts, unto ſuch perſon or perſons, and for ſuch ends, intents and purpoſes as he, the teſtator, ſhould by a private letter or paper of inſtructions, which he in his will mentioned he intended to leave with Mrs. *Johnſon*, then reſiding at *Gravelines*, or with her ſucceſſor for the time being, direct or appoint; and from and immediately after the ſale he directed his truſtees to pay the money, which ſhould ariſe therefrom, and the intereſt, until the principal ſhould be paid, unto and for the benefit of ſuch perſon, and in ſuch manner, as he the teſtator ſhould by the like private letter or paper of inſtructions direct and appoint. He gave to each of his truſtees twenty guineas for their trouble; and he gave and bequeathed all the reſidue of his eſtate, both real and perſonal, unto the ſame truſtees, their heirs, executors, and adminiſtrators, for the uſe and benefit of ſuch perſon as ſhould be

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(*a*) 29 *Char.* 2. *c.* 3.

named

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named in the ſaid private letter or paper of inſtructions; and he appointed his truſtees executors.

The teſtator died at *Gravelines* in *December* 1794. Immediately after his death, in his bureau in the room, in which he had reſided, belonging and adjoining to the monaſtery of *Engliſh* nuns at *Gravelines*, of which *Clementina Johnſon*, referred to in the will, was ſuperior, two paper writings were found in the ſame envelope with the will; which envelope was ſealed up, and indorſed in the hand of the teſtator, "The will of *Anthony Lowe*."

Theſe papers were, as follows; both in the hand-writing of the teſtator:

"*John Prujean*, Eſq. and his ſon *John* truſtees and executors "of my will—Gentlemen, I deſire, that immediately after my "deceaſe you will (previouſly deducting your charges and ex"pences in the execution of your truſt) pay the rent of my "houſes, in caſe they ſhall not then be ſold, or if ſold, pay the "monies, that ſhall ariſe by ſuch ſale, and the intereſt thereof, "and transfer and make over the ſecurities for the ſame, unto "Mrs. *Clementina Johnſon* now reſiding at *Gravelines* in *Flanders*, "or to her ſucceſſor then in being, or to ſuch other perſon or per"ſons as they or either of them ſhall appoint. By this you will "much oblige, Gentlemen, your moſt affectionate friend and "humble ſervant, *Anthony Lowe*. *Gravelines*, *April* the 17th "1789."

The other paper was directed thus: "Reverend Mother Abbeſs;" and was in the following words:

"Dear Madam—As to the worldly eſtate or effects I may die "poſſeſſed of or entitled to in *England*, I have deviſed them by "will to *John Prujean*, Eſq. and his ſon, upon truſt nevertheleſs "that the ſaid Gentlemen ſhall after my deceaſe as ſoon as con"veniently may be ſell and diſpoſe of my meſſuages or tene"ments ſituate in *St. John*'s Street in *Carlow* Court, *&c.*; and in "confidence moreover that they will after deducting their charges "and expences in the execution of their truſt pay the rent of "my houſes, if they ſhall not then be ſold, or if ſold, pay the

“ money, that ſhall accrue by ſuch ſale, and the intereſt thereof, and transfer and make over the ſecurities for the ſame, unto Your Reverence or your ſucceſſors then in being, or to ſuch other perſon or perſons as you or your ſucceſſor ſhall think proper to appoint. As on the one hand I ſtand indebted to 40 *l.* Sterling to Mr. *Errington*, and on the other hand bequeathed two legacies of twenty guineas to my executors, I am inclined to think the ſum you will receive in conſequence of the ſale of my property, Mr. *Errington* being paid, and the juſt mentioned legacies diſcharged, may amount to about 300 *l.* or 400 *l.* Sterling. The firſt hundred pounds I deſire Siſter *Winifred Clare*'s acceptance of as a compenſation for the loſs ſhe heretofore unfortunately ſuſtained in her fortune. A ſecond ſimilar ſum I beg may be placed out to intereſt towards the entertainment of church linen; and third hundred to be applicable to the purpoſe or purpoſes, which you or your ſucceſſor may judge to be moſt expedient. Should the ſum you receive exceed 300 *l.*, the overplus I entreat you to remit to Miſs *Catherine Mackey*, provided it does not ſurpaſs 50 *l.* In caſe it does, what may remain in your hands after you have given her the 50 *l.* you'll be pleaſed to accept for your own particular uſes. As nothing more occurs to mind that I could wiſh to add, except that I earneſtly recommend myſelf to your's and your community's pious prayers, and beg you will be ſo kind as to get fifty maſſes diſcharged for the repoſe of my poor ſoul, and one low maſs yearly to the ſame end, I ſhall therefore conclude with the unfeigned aſſurance of how much and ſincerely I am, Dear Madam, your and your community's moſt truly wellwiſher and devoted humble ſervant, *Anthony Lowe*. *Gravelines*, *April* 17th 1789.

“ *N. B.*—The legacy projected in favour of Miſs *Catherine Mackey*, which I confidently truſt will fall to her ſhare in conſequence of the ſale of my little property proceeds partly from the real eſteem and regard I have for her, and more particularly from the knowledge I have of her indigent circumſtances.”

Clementina Johnſon, the abbeſs, died in the life of the teſtator. Immediately on his death the cover containing all theſe papers was delivered to the lady, who ſucceeded Mrs. *Johnſon*, as abbeſs. *Prujean* the elder died in the life of the teſtator: but his ſon took poſſeſſion of the real and perſonal eſtate and the title deeds. A *Caveat* was entered by two couſins of the teſtator, claiming as his heirs at law and next of kin, againſt the probate of any of theſe papers; and they filed the bill againſt *Prujean*, and againſt *Winifred Clare* and *Catherine Mackey*; praying, that *Prujean* may be declared a truſtee for the plaintiffs as to the real and the reſidue of the perſonal eſtates, and deliver up the poſſeſſion and the title deeds, and account for the rents and profits, and the perſonal eſtate, *&c.*; inſiſting, that the papers found with the will could not be conſidered as the papers intended by the teſtator.

Mr. Mansfield and Mr. Johnſon for the plaintiffs—Upon the whole of the will and the circumſtances there is no diſpoſition whatſoever of this eſtate. It is admitted, that there was no paper in the hands of Mrs. *Johnſon* at her death; and there is no proof, that the teſtator ever did deliver to her any paper, expreſſing the purpoſes, to which his property ſhould be applied. There is therefore no diſpoſition of either the real or perſonal eſtate. As to the papers ſet up by the defendants as a diſpoſition, they bear date ſeveral months prior to the date of the will; and the expreſſion in one of them is "*I have deviſed by will;*" referring to a will previouſly made. That paper cannot poſſibly operate upon the beneficial intereſt of property given by a will made months before. The objects of that paper alſo are clearly ſuperſtitious. The legacy to Siſter *Winifred Clare* is given to her as a nun; and the overplus is given to the abbeſs in that character; and, it muſt be ſuppoſed, for ſuperſtitious uſes: part being directly ſo appropriated. The other two legacies perhaps might be good, if the will could have any operation: but it cannot. There is however no perſonal eſtate, and then theſe papers being unatteſted can have no effect upon the produce of the ſale of the real eſtate. Can they be ſo connected with the will as to form part of it? It was originally doubted, whether debts incurred after a charge of debts upon real eſtate would be charged: but that is now ſettled; and in *Habergham* v. *Vincent* (*a*) it was determined farther, that under a charge of legacies upon real eſtate legacies given by a

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(*a*) *Ante*, vol. 2. 204. 4 *Bro. C. C.* 353.

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ſubſequent unatteſted paper would be charged, by analogy to the caſe of debts. But all thoſe inſtances were caſes of auxiliary charge in aid of the perſonal eſtate; and in *Habergham* v. *Vincent* the Lord Chancellor expreſsly confines his opinion to that; excluding a primary charge; as this is. The money produced by the ſale of land is conſidered as land: *The Attorney General* v. *Lord Weymouth* (*a*). So, the rents are part of the land. A rent is within the Statute of Frauds as a tenement. The heir at law then muſt take, however ſtrong the intention againſt him, unleſs the real eſtate is diſpoſed of.

Mr. Romilly and Mr. Jordan for the defendants—It cannot be denied, that a conſiderable part of the diſpoſition by this paper is to a ſuperſtitious uſe; and ſo far without doubt the defendant is a truſtee for the heir. The legacies to *Winifred Clare* and *Catherine Mackey* are mere perſonal legacies; and the only queſtion is as to legacy of 100 *l.* to the Superior of this convent for the purpoſes, which ſhe or her ſucceſſor may judge moſt expedient; whether the character, in which it is given to her is ſufficient to ſhew, it is for a ſuperſtitious uſe.

As to the objections to the other legacies, firſt, that no paper was left in the hands of Mrs. *Johnſon*, and that the date of theſe papers is anterior to that of the will, it refers to a paper left with her or her ſucceſſor for the time being. Theſe papers were found ſealed up with the will in a room in a houſe belonging and adjoining to the convent. They are therefore, though not literally in the poſſeſſion of the Superior, in a houſe belonging to and a part of the convent. That qualification is only as evidence of the identity; and under the circumſtances this paper was ſufficiently left with the Superior. They were ſealed up with the will by the teſtator himſelf; though dated before. The indorſement in his hand-writing is ſufficient evidence of that; and that at that time he ſealed them up and publiſhed them as teſtamentary papers, ſtating his intention as to his property. Then what objection can be made to the legacies to *Winifred Clare* and *Catherine Mackey*, clearly given for their private benefit; the reaſon expreſſed; and not having any view to the community or the purpoſes of the ſociety?

(*a*) *Amb.* 20.

As to the objection for want of witneſſes it is now clearly ſettled, that a teſtator may diſpoſe of real eſtate by a paper unatteſted, but ſufficiently referred to by a will atteſted by three witneſſes. This paper, though written before the date of the will, was recogniſed and publiſhed afterwards. The paper referred to by the will is as much a part of the will as if contained in it.

The reply was ſtopped by the Court.

Lord Chancellor—I am very ſtrongly of opinion, thinking, theſe two legacies would be good, if the fund was well given, that there is not ſufficient legal certainty, to be collected from the inſtrument ſigned by three witneſſes, that the teſtator has diſpoſed of his real eſtate. The rule goes no farther than this: (I except charges for debts and legacies): that if the produce of real eſtate is to be diſpoſed of, you muſt ſhew an inſtrument in effect executed by the teſtator in the preſence of three witneſſes; and evidencing from its own contents, that it is ſo, in a ſenſe; even if no atteſtation is annexed to it. The rule of law is, that an inſtrument properly atteſted, in order to incorporate another inſtrument not atteſted, muſt deſcribe it ſo as to be a manifeſtation of what the paper is, which is meant to be incorporated; in ſuch a way, that the Court can be under no miſtake. In that way of putting the caſe it is not neceſſary to decide, whether the teſtator's intention before making the will, was, if theſe papers are incorporated, that his will ſhould not be conſummate, till they were delivered to the Superior; though, if the cauſe was decided upon that ground, I am not ſure, it would be wrong; for I can imagine, that he might have conceived a purpoſe of piety; and, taking it to be the moſt rational purpoſe of piety, he might conſider, that notwithſtanding his purpoſe at that time he might have more favour to his relations afterwards; and they might become as proper objects of his piety as any other; and therefore he might intend to diſpoſe of the money for ſuch purpoſe as ſhould be expreſſed in a paper he intended to leave with the Superior. I always thought the conſtruction of *Heylin* v. *Heylin* (*a*) rather critical. That caſe, however, was decided by high authority. But I take all theſe papers to have been prepared on the ſame

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(*a*) *Cowp.* 130.

ſame day. It is a more ſerious thing to execute a will than to ſign a letter: therefore, I apprehend, he ſigned the letters then; but heſitated about executing the will till *December*. Judging as a private individual, there can be no doubt, that, when he executed the will, he meant, that inſtrument and theſe two letters ſhould have their effect: but unleſs the rule of law allows me, I cannot eſtabliſh the letters; and I am not ſatisfied, he meant them to have their effect, unleſs delivered to the Superior; as he might mean that to be a part of the act to make the will complete. The intention of leaving them with her can never under the circumſtances, in which he lived, be ſatisfied by the circumſtance of finding them in the convent. He was living, and had his bureau, in that room, belonging to the convent; and it is impoſſible upon that circumſtance to ſay, that according to his intention he had left them with her. From his reſidence he could not avoid leaving them there. This is fortified by what follows. Mrs. *Johnſon* lived ſome time; and he never left any paper with her; or delivered any to her ſucceſſor. Certainly at his death the abbeſs had no notion they were left with her; for ſhe deſires the will to be brought to her; and gets poſſeſſion of it. In favour of an heir at law, whom I muſt ſee diſinherited by nothing but a clear manifeſtation of intention, it would not be too ſtrong to ſay, the teſtator did not mean his will to be conſummate, unleſs he ſhould do that act of leaving it with the Superior, which he never did.

But there is another ground: not, whether the ſame envelope or ſuperſcription is evidence, that the teſtator meant, theſe ſhould be the papers referred to; but whether I muſt of neceſſity collect from the contents of the will, that they ſhould be conſidered the ſame. The ſame cover is nothing with reference to the ſtatute; and the ſuperſcription has not three witneſſes. The true queſtion is, if theſe papers were found in the bureau with the will, can I ſay from the contents of the will, theſe two papers are the papers referred to? Suppoſe, ſeveral other papers were found with them: could I ſay, this will would have enabled me to ſelect theſe two as the only papers referred to? The rule and my opinion are, that the will has not by its contents ſufficiently identified theſe papers to enable me to ſay, they are neceſſarily incorporated: if not, they are not atteſted by three witneſſes; and it is admitted on all hands, that this ſort of diſpoſition, unleſs the antecedent paper is incorporated, cannot be brought within the rule as to debts and legacies charged on real eſtate by an unatteſted paper. I cannot therefore give theſe parties their legacies; though I regret it.

Legacy to ſuch purpoſes as the Superior of a convent or her Succeſſor may judge moſt expedient, void as a ſuperſtitious uſe.

During the argument the Lord Chancellor expreſſed his opinion, that the legacy of 100 *l.* for ſuch purpoſes as the Superior of the convent or her Succeſſor ſhould judge moſt expedient, being given in that character, was ſufficient to ſhew, it was for a ſuperſtitious uſe (*a*).

(*a*) *De Garcin* v. *Lawſon*, *ante*, vol. 4. 433. note.

BRYDGES v. PHILLIPS.

Rolls.
Nov. 23.

To exempt the perſonal eſtate from the debts the will muſt ſhew that intention by indication plain: a proviſion for the debts out of the real eſtate is not ſufficient.

FRANCIS WILLIAM THOMAS BRYDGES by his will, dated the 1ſt of *March* 1788, after the uſual introduction, as to being of ſound mind, *&c.* appointed his wife *Ann* guardian to his only daughter, an infant about four months old; and confirmed the ſettlement made upon their marriage in all reſpects. The will then proceeded thus:

"But ſhould I die ſoon, in which caſe there may be long minority of my daughter, and to obviate any difficulty, that may "ariſe in my affairs upon that account, I give and deviſe to my "worthy friends and truſtees *Robert Phillips* and *Francis Woodhouſe*, Eſq. all and ſingular my manors, meſſuages, tithes, "lands, and hereditaments, within the ſaid county of *Hereford*, "which are not included in my ſaid ſettlement, or have not ſince "been purchaſed by me, and the equity of redemption of and in the "ſame reſpectively: to hold to the uſe and behoof of them, their "heirs and aſſigns; in truſt nevertheleſs to ſell and abſolutely "diſpoſe of the ſame or ſuch part and parts thereof as they ſhall "judge moſt convenient to part with; (with power in the mean "time to pay off the mortgage now affecting the ſame; and for "that purpoſe to take up money; and confine or reſtrain ſuch "new mortgage to ſuch parts of the premiſes, which are not in-"tended to be diſpoſed of; and which will be very ample to "anſwer both purpoſes); and by and with the money ariſing "thereby in the firſt place to pay off and diſcharge all my juſt "debts (except the ſaid mortgage of my ſaid eſtates, and a charge "of 4000*l.* to my two ſiſters *Ann* and *Catherine;* which by my "ſaid ſettlement are provided for, and directed to be paid out of "another fund): and in the next place to raiſe and pay to my "half-ſiſter *Elizabeth Creighton Brydges*, now living with my "father at *Madley*, the ſum of 1000*l.*, to carry lawful intereſt "from the day of the death of my ſaid father; unleſs I ſhall in "my lifetime (and which I fully intend doing) make as large and "ample a proviſion for her in ſome other way; and in the laſt "place to raiſe and pay to my ſaid dear wife the ſum of 4000*l.* "for her own uſe and benefit; and the reſt and reſidue of my "ſaid unſettled eſtates, as alſo all other my manors, meſſuages, "lands, tithes, and hereditaments, whatſoever, both freehold, "leaſehold, and copyhold, which were ſo ſettled upon my mar-"riage in caſe I ſhall die without iſſue male either born in my "lifetime or after my deceaſe I give, deviſe, and bequeath, to "my ſaid dear wife for the term of her natural life; and from "and immediately after her deceaſe to the uſe of my ſaid dear "daughter *Ann* and the heirs of her body lawfully to be begotten; "and in default of ſuch iſſue to the uſe of my ſaid two ſiſters "*Ann* and *Catherine*, and their reſpective heirs, as coparceners, "and not as joint-tenants."

The teſtator then directs and earneſtly requeſts, that, in caſe he ſhall die without iſſue male, as before mentioned, and his ſaid daughter ſhall ſucceed to and inherit his ſaid eſtates, any huſband ſhe may marry, ſhall take the ſurname of *Brydges*, and tranſmit the ſame to his poſterity, being the iſſue or deſcendants of his ſaid daughter *Ann;* and then proceeded, as follows:

"And I farther direct, that all the plate, linen, china ware, "books, houſehold goods, and other furniture and effects, at "*Tiberton* aforeſaid ſhall remain there as and in the nature of "heir-looms, for the uſe of my ſaid daughter, or ſuch other per-"ſon and perſons, who may take or inherit my ſaid eſtates "under and by virtue of the ſaid ſettlement, this my will, or "either

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"either of them. I give and continue to my ſaid father for his "life the poſſeſſion of the houſe he now inhabits at *Madley* afore- "ſaid, and of the ſeveral lands thereto belonging, and now in "his poſſeſſion, together with the annuity or allowance of 80*l.* a "year, which I have hitherto made him; which I deſire he "may enjoy, and have the ſame paid him regularly, as uſual, "during his life; and which I hereby charge upon all and every "part of my ſaid unſettled eſtates."

Then, after giving legacies to his ſervants, and 100*l.* to each of his truſtees *Phillips* and *Woodhouſe* for their trouble, the teſtator concluded thus:

"All which ſaid laſt mentioned legacies I deſire may be paid "out of my perſonal eſtate (except that part given as aforeſaid for "heir-looms); and all the reſt and reſidue of my ſaid perſonal "eſtate (except as aforeſaid) I give and bequeath to my ſaid dear "wife, whom together with the ſaid *Robert Phillips* and *Francis* "*Woodhouſe* I conſtitute and appoint executrix and executors of "this my will."

The teſtator died in 1793; leaving two daughters co-heireſſes; one of whom is ſince dead. The bill was filed by *Elizabeth Creighton Brydges* and *Joſhua Scrope* and *Ann*, his wife, who was the teſtator's widow, to have the will eſtabliſhed, *&c.* Upon an iſſue directed, *Deviſavit vel non*, the will was eſtabliſhed.

The cauſe coming on upon the Equity reſerved, the only queſtion was, whether the perſonal eſtate was exempt from the debts.

Mr. Richards and Mr. Alexander for the plaintiffs—The general principle is certainly, that the perſonal eſtate is the fund naturally applicable to debts; and therefore there muſt be ſomething to ſhew the intention, that it ſhall be exempted. This is a deviſe of particular, excepted, eſtates, not by way of charge, but to be ſold and abſolutely diſpoſed of. Simple contract debts are in this reſpect legacies; a bounty to the creditors; who had not before the means of coming at the real eſtate. Here is a bequeſt to the wife as reſiduary legatee; and not in the character of exe-

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cutrix, for the purpoſe of diſtributing in the courſe of that duty. The words "except as aforeſaid" in the reſiduary diſpoſition are material; ſhewing, that the reſidue intended is the reſidue ſubject only to a deduction in reſpect of the legacies given out of the perſonal eſtate; affording an irreſiſtible inference, that the perſonal eſtate was to go to her ſubject to no other charge; and that the debts were to go out of the real eſtate. Certainly in *Burton* v. *Knoulton* (*a*) ſome ſtreſs was laid on the direction to pay the funeral expences; and Lord *Roſslyn* laid ſtreſs upon the omiſſion of that in *Tait* v. *Lord Northwick* (*b*); wiſhing to diſtinguiſh that caſe from the other. Lord *Hardwicke* in *Walker* v. *Jackſon* (*c*) conſiders the inſertion of thoſe words as of no weight.

Mr. Piggott for the defendant was ſtopped by the Court.

The Maſter of the Rolls—There is certainly room for conjecture, that this teſtator did mean to throw the whole of the debts upon his real eſtate. But it is only a probable conjecture; there is no certainty, no clear, unambiguous, intention to be collected from the whole will, that he meant that; and there is no diſtinct difference between this caſe and *Tait* v. *Lord Northwick*. Very ſmall differences may be pointed out: but ſuch as would form no guide for other caſes; and leading to puzzle and confuſe, rather than to give aſſiſtance to thoſe, who may be called upon to adviſe as to the conſtruction or frame of wills. There is in this, as in many caſes, a very diſtinct proviſion for the payment of all the teſtator's debts by the ſale of real eſtates. There is no proviſion for the payment of the funeral expences. I think, the omiſſion of that has had full as much weight in ſome of the late caſes as is due to it. Perhaps it is true, as has been ſtated from Lord *Hardwicke*, that it is more a phraſe of form than indicating a ſettled intention; and that either the inſertion or omiſſion of it means little. But it is argued, that wherever the perſonal eſtate is taken to be exempted, either the whole perſonal eſtate, or the reſidue after charges, it is taken as a ſpecific legacy; and if it is once broken in upon, how is it liable to one charge and not to another? You oppoſe the conſtruction, that it is ſubject only to particular legacies, by ſhewing, there is

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(*a*) *Ante*, vol. 3. 107: See the references to that caſe and *Hartley* v. *Hurle*, *ante*, vol. 5. 540.

(*b*) *Ante*, vol. 5. 816.

(*c*) 2 *Atk*. 624.

ſomething elſe, that muſt come out of it. In that way the argument is applied from the omiſſion to provide for funeral expences; and that is the only way, in which it has application; for I do not think, there is much inference from it as to the intention.

This teſtator then proceeds to give particular legacies out of the real eſtate; and it is ſaid, it is clear, thoſe legacies muſt come out of that, and no other, fund. True; for they have no exiſtence but by the will; and muſt come out of the fund the teſtator points out. But the debts have a ſeparate and independent exiſtence. He then diſpoſes of ſome part of his perſonal eſtate as heir-looms; and gives certain legacies, directed to be paid out of the perſonal eſtate. It is ſaid, that ſhews, the debts are to be paid out of the real eſtate. That intention appears with no degree of certainty. He might have meant only to diſtinguiſh thoſe legacies from the other legacies, to be paid out of the real eſtate. No clear intention appears to make a diſtinction between debts and legacies; and that the latter only ſhall come out of the perſonal eſtate. It is ſaid, the words "except as aforeſaid" refer to thoſe few legacies immediately before given. That is clear miſconſtruction. They refer to what is immediately before mentioned, *viz.* what is excepted for heir-looms. In *Tait* v. *Lord Northwick* there was more room for arguing, that the reſiduary clauſe had reference to the two legacies immediately before given: but it was held to mean the general reſidue; that it muſt be taken as ſuch; and muſt be ſubject to every thing naturally a charge upon the fund, of which it is the reſidue; though the teſtator does not diſtinctly enumerate every thing payable out of it. The reſiduary legatee cannot take the fund except after diſcharging every thing payable out of it.

Upon the whole of this will there is no indication plain of an intention to exonerate the perſonal eſtate from the omiſſion to provide for the funeral expences. I rather conjecture, that the teſtator did intend, that the real eſtate he had ſet apart ſhould be devoted to the payment of his debts. I could not be certain, that I might not be miſtaken even in privately ſuppoſing that: but there is no ground, upon which I can judicially collect a ſettled intention.

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The truſtees and executors are not in this caſe wholly the ſame perſons. Where they were the ſame, that has been uſed as an argument againſt the exoneration. In this will two of the executors are truſtees: but then the wife is added.

Nov. 16.
Dec. 8.

SALLES *v.* SAVIGNON.

In the caſe of a ward of the Court a marriage in fact is ſufficient to ground the contempt.

Upon the marriage of a ward of the Court, both parties being foreigners, and the property abroad, and the marriage in *Scotland* on the day the bill was filed, the Court took juriſdiction; but did not commit the huſband; ordering him to attend from time to time, and to be at liberty to make a propoſal.

UPON a petition preſented on the marriage of a young lady, a ward of the Court, the circumſtances appeared to be theſe.

Both the parties were foreigners, natives of the Iſland of *Martinique;* and all the lady's property was in that iſland; except the conſignments made to this country, ſince that iſland had been reduced by his Majeſty's forces. The marriage took place in *Scotland* upon the ſame day that the bill was filed. The huſband had previouſly written to the guardian and mother of the lady in *Martinique*, offering any ſettlement they ſhould approve. The young lady by affidavit ſtated her apprehenſion of the petitioner's purpoſe to take her to *Hamburgh* and marry her to his ſon. Some doubt was alſo ſuggeſted as to the validity of the marriage.

The parties attended in Court under an order for that purpoſe.

Mr. Bell in ſupport of the petition.

Mr. Cox for the huſband ſuggeſted a doubt, whether the Court would aſſume juriſdiction under ſuch circumſtances; obſerving, that the whole of this proceeding is founded in fiction; and that any order in this inſtance would carry the principle a great way.

The Lord CHANCELLOR held, that a marriage in fact was ſufficient to ground a contempt of the Court. His Lordſhip expreſſed ſome diſpleaſure at the huſband's not attending upon the firſt notice: but obſerving, that his being a foreigner might be ſome excuſe

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cuſe, would not commit him; but ordered him to attend from time to time, when required, and forthwith to lay a propoſal before the Maſter. An inquiry into the circumſtances of the marriage, and as to the circumſtances of the parties, was alſo directed.

Upon a ſubſequent attendance an order was made, that the huſband ſhould be at liberty to go before the Maſter; and execute ſuch ſettlement as ſhould be agreed upon, with the approbation of the Court (*a*).

(*a*) *Stockpole* v. *Beaument*, *ante*, vol. 3. 89.

ANONYMOUS.

Dec. 12.

Order, after verdict upon an iſſue to examine *de bene eſſe* a witneſs above ſeventy; ſuggeſting an intention to move for a new trial.

After trial of an iſſue directed in this cauſe, Mr. *Bell* for the plaintiff moved, that he might be at liberty to examine a witneſs *de bene eſſe*, for the purpoſe of ſecuring his teſtimony in caſe of his death, upon the ground, that it was intended to move for a new trial; and the witneſs was above ſeventy years old.

The order was made.

TROUGHTON *v.* BINKES.

Dec. 15. 17.

Creditors under a deed of truſt cannot have a decree for redemption againſt a mortgagee; unleſs a ſpecial caſe; as colluſion; that the truſtee refuſes, &c. In this caſe the bill by the creditors prayed, not a redemption but a ſale; to which the mortgagee would not conſent; but ſubmitted to be redeemed; and the bill was diſmiſſed.

The bill was filed by four perſons, claiming as creditors of *Henry Evans Holder*, on behalf of themſelves and all other creditors, who ſhall come in and contribute to the expence of the ſuit, againſt the truſtees under a general deed of truſt for the creditors (*a*); the *Daniels*, claiming under a prior mortgage, and being conſignees of the eſtate in *Barbadoes*, *Norton*, a judgment creditor, *Spragg*, the aſſignee of *Holder*, and againſt *Holder* himſelf; who died before the hearing.

The plaintiffs *Kidd* and *Kennett* were at the date of the truſt deed creditors of *Holder* to the amount of 42*l.* for goods ſold. Subſequent to the deed of truſt *Holder* contracted another debt with them to the amount of 136*l.*; for which he executed a mortgage to them of the ſame eſtate in *Barbadoes*, with the ſtock for ninety-nine years, and warrants of attorney to confeſs judgment. By indentures, dated the 23d of *December* 1796, *Kennett* and *Kidd* aſſigned their debts and ſecurities to the plaintiff *Troughton*. The fourth plaintiff *Bloxham* was a creditor, as indorſee of a bill of exchange drawn by *Holder*, and diſhonoured.

The bill prayed an account of the profits and produce of the plantation, &c. received by the *Daniels*, and of the application, and of what is due to them and to *Norton* on their ſecurities; and that the premiſes may be ſold; and that the money produced may be applied in the firſt place in payment of what ſhall be found due to the *Daniels* and *Norton*. The bill alſo prayed an account againſt the truſtees, and an application according to the truſts of the deed for the benefit of the creditors.

The defendants, the *Daniels*, who claimed under their mortgage a debt of above 7,500*l.*, by their anſwer refuſed to conſent to a ſale; and they ſtated, that they are ready and willing on being paid the whole of what is due to them on their mortgage and their coſts to convey, as the Court ſhall direct; but ſubmit, the plaintiffs are not entitled to have the accounts prayed taken as againſt them, unleſs the plaintiffs will undertake to redeem ſaid premiſes and to pay to the defendants the whole of what now remains due to them on ſaid mortgage.

Mr. Piggott, Mr. Romilly, and Mr. Jordan for the defendants, the Daniels, inſiſted, that the plaintiffs had no right to redeem them, notwithſtanding the ſubmiſſion in their anſwer; that the Bill

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(*a*) See *Spragg* v. *Binkes*, *ante*, vol. 5. 583.

did not ſeek a redemption; and the ſubmiſſion to do that, which the plaintiffs do not ſeek, cannot ſupply the want of proper allegations in the bill and the prayer of that relief; and that the plaintiffs ought to have amended the bill and to have ſhewn a right to redeem.

The Maſter of the Rolls (*a*)—Moſt of the relief ſought by this bill is of courſe. But it prays an account againſt the *Daniels*: and that the eſtate may be ſold; and the money applied in the firſt place in payment of what ſhall be due to them. It is admitted, there could be no ſale; the mortgagees not conſenting to a ſale. The plaintiffs are creditors under the truſt deed. The truſtees could come for a redemption: but I doubted, whether two or three creditors could come in their own names to redeem for their own benefit. It ſtruck me as extraordinary, that they ſhould file a bill to redeem for themſelves, and ſo gain a preference; for then they muſt be redeemed. But it is now admitted, that they cannot claim to redeem to that extent; but if any creditors chooſe to come in and contribute, then all are to have the benefit. I ſhould have thought, the truſtees ſhould have come, and have claimed the benefit for them: not, that the creditors themſelves ſhould come in the firſt inſtance, and as a matter of courſe. For that a caſe muſt be made; that the truſtees were called upon to redeem; and they refuſed. A caſe of that kind, *Franklyn* v. *Ferne*, was ſtated; in which the general principle was recognized; but it was decided, that the plaintiff had made a caſe. Lord Chief Baron *Parker* ſtated the eſtabliſhed principle, that he, who has the legal eſtate, muſt redeem; unleſs a ſpecial caſe is made; as, that truſtees or executors are colluding (*b*); or, if they are unſafe. I am therefore confirmed in my opinion, by the authority of that caſe as well as by analogy, that the Court cannot in this ſhort way decree redemption. In *Utterſon* v. *Mair* (*c*) it was alleged, that the executor was an inſolvent perſon. The aſſignees demurred; as the executor was the perſon to make the demand; and the demurrer was allowed. The Lord Chancellor was of opinion, that a caſe might be made: but that was not done. In this caſe I am of opinion,

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(*a*) *Ex Relatione.*

(*b*) *Doran* v. *Simpſon*, *ante*, vol. 4. 651.

(*c*) *Ante*, vol. 2. 95. 4 *Bro. C. C.* 270.

that

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that, though a ground is made for redemption, this bill is not framed for that relief.

Diſmiſs the bill againſt the mortgagees.

Dec. 22.

Ex parte HODGES.

No order can be made under Lord *Eldon*'s Act, 40 *Geo.* 3. *c.* 56. authoriſing the payment of money, in truſt to be laid out in land, to be ſettled, to the tenant in tail, without a previous inquiry as to incumbrances.

THIS petition was preſented under the late Act of Parliament (*a*); for the purpoſe of having money, in truſt to be inveſted in land, to be ſettled, paid to the perſon, who would be tenant in tail.

The Lord CHANCELLOR ſaid, Lord *Roſslyn* had ſettled, that there muſt always be a reference to the Maſter to inquire, whether the parties had in any manner incumbered their intereſts in the money.

Mr. Alexander in ſupport of the petition ſuggeſted, that in a plain caſe that reference might be diſpenſed with.

The Lord CHANCELLOR ſaid, he never would diſpenſe with it; obſerving, that in the plaineſt caſe it cannot without that inquiry appear, whether the parties have incumbered their intereſts.

The order accordingly directed an inquiry, whether the parties are entitled, and under and ſubject to what charges and incumbrances (*b*).

(*a*) Stat. 40 *Geo.* 3. *c.* 56.

(*b*) *Ex parte Bennet*, *Ex parte Dolman*, *ante*, 116.

Dec. 22.

Ex parte BRETTELL.

Under a general reſiduary diſpoſition by will to a natural ſon, his heirs, executors, adminiſtrators, and aſſigns, for ever, to and for his and their own proper uſe and behoof, a truſt eſtate does not paſs.

By an order, dated the 18th of *November* 1801, the Maſter was directed to inquire, how certain real eſtates were veſted in *George Brettell*, an infant; and whether he was an infant truſtee or mortgagee within the ſtatute (*a*).

The Maſter's Report ſtated a mortgage in fee in 1775 of gavelkind lands in *Kent* to *Thomas Brettell*, as truſtee for *John Brettell*. *Thomas Brettell* died in 1795; having by his will, dated the 15th of *January* 1791, duly executed according to the Statute of frauds (*b*), made the following reſiduary diſpoſition:

"All the reſt, reſidue, and remainder, of my eſtate and effects "whatſoever and whereſoever and of what nature or kind ſoever, "I give and bequeath the ſame unto my natural ſon *George Hall*, "now a midſhipman belonging to my ſhip the *Canton*, his heirs, "executors, adminiſtrators, and aſſigns, for ever, to and for his "and their own proper uſe and behoof."

The teſtator appointed *William Luſhington* and the ſaid *John Brettell* his executors. *George Hall* afterwards aſſumed the name of *Brettell*; and in 1800 died, a widower and inteſtate, leaving a daughter, named *Ann*, and a ſon, named *George*, his only children, both now infants under the age of four years; and adminiſtration was granted to *John Brettell* and *James Farrer*, the guardians of the infants, until one of them ſhould attain the age of twenty-one. *John Brettell* died on the 21ſt of *May* 1801 inteſtate; and adminiſtration of his perſonal eſtate was granted to his widow, *Ann Brettell*; who was entitled to the equity of redemption previouſly to her marriage.

The Maſter ſtated, that he was of opinion, that the ſaid real eſtates paſſed by the ſaid deviſe in the will of *Thomas Brettell*; and were then veſted in *George Brettell*, the infant, as the only ſon

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(*a*) 7 *Ann*, *c*. 19.

(*b*) 29 *Char*. *c*. 3.

1801.

Ex parte BRETTELL.

ſon and heir at law of *George Hall*, otherwiſe *Brettell;* and that the ſaid *George Brettell* was an infant mortgagee within the Statute.

The petition was preſented by *Ann Brettell;* praying, that the Report may be confirmed; and that the infant may be directed to convey.

Mr. Romilly in ſupport of the petition—The laſt caſe, *The Attorney General* v. *Buller* (*a*), contradicts the former, *Ex parte Sergiſon* (*b*). The Lord Chancellor there underſtands the rule to be, that an intention to paſs the truſt eſtate muſt be ſhewn. In this will no ſuch intention appears. The moſt general words are uſed: and this alſo is a diſpoſition to a natural child; and it will be very inconvenient, if the truſt eſtate goes to him. As there is no inference of intention, upon the authority of that caſe the Maſter's Report is wrong. The words in that will "all my real "and perſonal eſtate, not before hereby given," *&c.*, might be ſuppoſed to refer to truſt eſtates.

Lord CHANCELLOR—When the rule comes to be put upon the intention appearing in the will, it raiſes a claſs of caſes, which it is very difficult to diſpoſe of. With reſpect to the convenience, I rather agree with what the Attorney General ſays in the caſe referred to; for, beſides an eſtate tail, you cannot tell, how many contingent remainders and executory deviſes there may be. When the teſtator ſpeaks of eſtates in truſt for him, and ſays nothing about eſtates in him in truſt for other perſons, the inference is, that he did not mean them. In this inſtance it is very ſtrong from the circumſtance, that the perſon, to whom the teſtator gives the reſidue of his eſtate, is a natural ſon; and if he ſhould die without children and without a will, the legal eſtate might go to the Crown. On the other hand, the teſtator meaning to give every thing he had to the natural ſon might very probably mean to give every thing, that would fall within thoſe general words. This diſcuſſion began with Sir *Thomas Sewell;* and his idea was, that the word "my" would not refer to what was not beneficially his. In this will there are the words "to and for his and their "own proper uſe and behoof." Probably the teſtator meant nothing

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(*a*) *Ante*, vol. 5. 339.

(*b*) *Ante*, vol. 4. 147.

thing by that: but a meaning muſt be attributed to every word. I rather think, there is not enough here to make the infant a truſtee.

Declare, the infant is not a truſtee within the ſtatute; and therefore diſmiſs the petition.

Ex parte WARD.

Dec. 22.

Any fair and reaſonably provident application as to the execution of a Commiſſion of Lunacy is not diſcouraged: but in this inſtance the petition being wholly groundleſs was diſmiſſed with coſts.

THIS petition, praying leave to traverſe an Inquiſition of lunacy, was preſented by an entire ſtranger without any intereſt. An objection was taken upon that ground; and upon the affidavits it was clear, there was no ground for impeaching the Commiſſion.

Mr. Romilly and Mr. Thomſon in ſupport of the petition. Mr. Mansfield for the committee.

Whether a mere ſtranger having no intereſt would be permitted to traverſe an Inquiſition of Lunacy, *Quære.*

Lord CHANCELLOR—This petitioner does not qualify in himſelf any intereſt; and I do not recollect any inſtance, in which the Court has permitted a mere ſtranger to traverſe the inquiſition. I will not ſay without farther conſideration, when it may be neceſſary to decide the point, whether the Court would permit it or not. Whatever may be the rule as to that, I ſhould hope, the wiſdom, policy, and humanity, of the law with regard to theſe unhappy perſons would never be diſappointed; for my own experience enables me to ſay, the Court has not been in the habit of diſcouraging any fair and reaſonably provident application with regard to the ſituation of a perſon, allowed to be a lunatic, if he is more preſſed in the execution of the Commiſſion than a tender and humane conſideration of his circumſtances would authoriſe, or of a perſon, not allowed to be a lunatic, but made the object of a Commiſſion. The law has provided, that no perſon ſhall be put in ſuch a ſituation, deprived of his liberty and the adminiſtration of his affairs, until the fact is aſcertained by a proceeding, that I muſt admit to be *ex parte:* a proceeding, which the law ſuppoſes

1801.

Ex parte WARD.

Right to traverſe an Inquiſition of Lunacy under the Statute 2 *Edw.* 6. *c.* 8. *ſ.* 6.

ſuppoſes may collect miſtake; and therefore has given a poſitive right to certain perſons to traverſe the inquiſition (*a*).

This is the petition of a perſon, who, as far as I can perceive upon the affidavits, lays no foundation whatever for impeaching the Commiſſion in any one circumſtance at the ſame period as the finding of the Jury; but certainly not in any one circumſtance of conduct or miſconduct, that has happened ſince the finding. The petition therefore muſt be diſmiſſed. As to the coſts, though I do not think, the true intereſt of lunatics is conſulted by perſons, who act upon their own views of the ſanity or inſanity, formed upon occaſional converſations, and come too raſhly to this Court without ſufficient inquiry, yet it is the duty of the Court not to cenſure too haſtily any application upon a ſubject ſo very important as this. In this particular caſe I do not think, that cenſure would be too haſty; and therefore the petitioner muſt pay the coſts: the petition being ill founded, and moſt raſhly preſented: but if the parties on the other ſide will act ſo far upon the general principle, inclining the Court not to diſcourage applications of this nature, they will ſacrifice to general humanity by not calling for the coſts. If however they do call for them, I am of opinion upon the whole, I cannot very well refuſe them.

Petition diſmiſſed with coſts.

(*a*) Stat. 2 *Edw.* 6. *c.* 8. *ſ.* 6. *Ex parte Wragg*, *Ex parte Ferne*, *ante*, vol. 5. 450. 832.

Dec. 21. 26.

JONES *v.* PENGREE.

Plea covering too much ordered to ſtand for an anſwer, with liberty to except.

Whether tranſactions between principal and agent are within the Exception in the Statute of Limitations as to merchants' accounts, *Quære*.

Whether, in order to have the benefit of the Exception in the Statute of Limitations as to merchants' accounts, ſome tranſaction muſt have paſſed within ſix years, *Quære*.

THE bill ſtated, that the defendant *George Pengree* carried on buſineſs in partnerſhip with ſeveral perſons, among other things in large copper works and concerns in the county of *Glamorgan*; and *Benjamin Jones* was employed by the Company as their agent; and they were indebted to *Jones* at his death in

May 1787. *Jones* during his agency made remittances by bills, *&c.* to the defendant and Company and others to the amount of 5,912*l.* 14*s.* 5*d.* and upwards; and he alſo lent and advanced to the defendant 500*l.*; for which the defendant gave *Jones* his promiſory note, payable with intereſt: but ſuch note is loſt; and was never ſatisfied. The defendant is the ſurviving partner, or if the other partners are not dead, the defendant by virtue of ſome arrangement with him is become ſolely liable to the partnerſhip debts; and there are mutual accounts unliquidated between the plaintiff, as adminiſtratrix of *Benjamin Jones*, and the defendant. The bill charged, that the accounts of dealings and tranſactions between the parties in 1785 and 1786 were never ſettled, by the negligence of the defendant; that if any accounts were ſettled, they are erroneous: ſtating various remittances in 1783 by *Jones*; and that the defendant has frequently within the laſt ſix years admitted, that he was indebted to *Benjamin Jones*, as aforeſaid, and promiſed to account; but pretends, *Jones* was indebted to him; and refuſes to render an account, *&c.*; and prayed an account, *&c.*

As to ſo much of the bill as ſeeks an account of any dealings and tranſactions between *Benjamin Jones* and the defendant in his ſeparate capacity, or the defendant and his partners, and a diſcovery touching ſuch account, and to compel the defendant to pay any balance, *&c.*, and as to any relief prayed upon the foundation of any ſuch accounts, the defendant pleaded in bar, that if the plaintiff had any cauſe of ſuit, concerning the matters in the bill mentioned, the ſame aroſe above ſix years before filing the bill and ſerving the defendant with proceſs; averring, that within ſix years he did not admit, that he was indebted to the plaintiff in any manner whatſoever; and did not promiſe or agree to account, *&c.*; and therefore pleaded the Statute of Limitations (*a*).

And as to ſo much of the bill as the defendant had not pleaded to, he anſwered, admitting the trading, *&c.*, the employment of *Jones*, as agent, and that in the courſe of ſuch employment he paid and received large ſums belonging to the partnerſhip, but not any other ſums, as the defendant knows or believes, on account of

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(*a*) Stat. 21 *Jam.* 1. *c.* 16. *ſ.* 3.

the partnerſhip. He denied, that *Jones* lent money to the partners, or that the defendant received money to the uſe of *Jones*, or that the defendant and his partners were indebted to *Jones*, *&c.* He alſo denied, that he lent *Jones* 500*l.* or any other ſum upon his promiſory note, or otherwiſe. He ſtated, that he believes *Jones* died, as mentioned in the bill; and the plaintiff is his adminiſtratrix; that *Lawrence Bond* was a partner with the defendant; and does not know, whether he is living, or not: if dead, admits he (the defendant) is ſolely liable, as ſole ſurviving partner: if living, denies, that he (the defendant) is ſolely liable. He denies any application till ſhortly before the bill; that any accounts were unſettled through his negligence; that he made any admiſſion within ſix years, that he was indebted to *Jones;* or promiſed to account, *&c.* (as charged by the bill). He ſtated his belief, that *Jones* died inſolvent; and the plaintiff lay in gaol for a ſmall ſum; therefore ſubmits, if ſhe had any demand, ſhe would not have permitted it to lie ſo long dormant.

Mr. Romilly and Mr. Heald in ſupport of the plea—One objection, that will be made to this plea, is, that theſe are merchants' accounts; and therefore the Statute of Limitations does not apply. Theſe are not merchants' accounts: but, if they were, it is ſettled, that the Exception (*a*) of the Statute extends only to caſes, in which there has been ſome tranſaction within ſix years; and then the effect is to take the whole out of the Statute: *Welford* v. *Liddel* (*b*). In *Crawfurd* v. *Liddel* (*c*) the bill prayed an account of tranſactions under a Patent for extracting oil from tar. A plea of the Statute was put in; with an averment, that theſe were not merchants' accounts. For the plaintiff *Catling* v. *Skoulding* (*d*) was cited: but Lord *Roſslyn* was of opinion, that the meaning of the Exception in the Statute was, that if any tranſaction between the parties took place within ſix years, none of the tranſactions ſhall be barred; but that, where all the tranſactions were over more than ſix years, the Statute might be pleaded as well to merchants' accounts as others; and the plea was allowed.

(*a*) It does not extend to the caſe of a tradeſman and his cuſtomers: *Cotes* v. *Harris*, 1 *Eſp. Dig.* 151. *Wace* v. *Wyburn*, *Bul. N. P.* 149.

(*b*) 2 *Veſ.* 400.

(*c*) Before Lord *Roſslyn*, 15th *Nov.* 1796.

(*d*) 6 *Term Rep. B. R.* 189.

The juriſdiction of this Court as to putting limits to ſuits does not depend upon the Statute; but is much older. *Smith* v. *Clay* (*a*).

Mr. Owen for the plaintiff—The object of this bill is an account of tranſactions unliquidated, that took place in the life of *Benjamin Jones*; and the charge is, that there were mutual accounts between the parties. Anticipating a ſuppoſed defence, that accounts were ſettled every year, the bill ſtates, that in 1785 and 1786 no accounts whatſoever were ſettled, by the default and negligence of the defendant; and ſuggeſts a variety of errors in the accounts ſuppoſed to be ſettled in 1783. Another charge is the admiſſions of the debt within the laſt ſix years, and the pretence of croſs demands; which he refuſes to diſcover.

The defence againſt this bill is a plea of the Statute of Limitations and an anſwer. The objection now urged from the length of time and inconvenience of unravelling accounts, &c. may be material at the hearing; but cannot avail upon the argument of the plea. To the plea there are various objections. The introductory part goes, not only to the dealings and tranſactions allowed by the bill to have paſſed more than ſix years ago, but to any diſcovery relating to them; which goes even to thoſe charges introduced for the purpoſe of taking the caſe out of the Statute; covering therefore that part, to which the plaintiff is entitled to an anſwer, and to which the defendant has given an anſwer. The next part is an evaſive plea of *Non aſſumpſit infra ſex annos*: a ſort of anſwer; that he has not admitted within ſix years, that he is indebted to the plaintiff in any manner whatſoever, and did not promiſe or agree within ſix years to come to an account; and this is followed by an anſwer in the very ſame words. In that reſpect it is multifarious. All this part of the plea may be true, that he did not within ſix years admit, that he was indebted, or promiſe to account; and yet it may be true, that he had not paid the plaintiff; pretending a great counter-demand.

Next; this is within the exception of the Statute. It does not appear, that the caſe before Lord *Hardwicke* was a caſe of merchants'

(*b*) *Amb.* 645. The note to *Lord Deloraine* v. *Browne*, 3 *Bro. C. C.* 633. *Hercy* v. *Dinwoody*, 4 *Bro. C. C.* 257. *Ante*, vol. 2. 87.

1801. JONES v. PENGREE.

chants' accounts. The exception in the Statute is general. In *Catling* v. *Skoulding* Lord *Kenyon* ſays (*a*) diſtinctly, that merchants' accounts are out of the ſtatute. There was an item within ſix years; upon which they let it go to a jury: but it was decidedly held, that if it appears upon the plea or replication, that they were merchants' accounts, no length of time is a bar. The words "factor or ſervant" are nugatory; unleſs the exception applies to a tranſaction between a merchant and his ſervant.

A plea alſo may be bad, as not covering enough: *Blacket* v. *Langlands* (*b*). This plea is alſo defective in that reſpect. It ought to go to every thing, except the charges introduced into the bill for the purpoſe of taking the caſe out of the Statute; which it is neceſſary to anſwer. A plea of the Statute of limitations is a plea in bar; which admits the title of the plaintiff to ſue the defendant. This plea conſequently admits, that the plaintiff as adminiſtratrix has a right to ſue the defendant in reſpect of theſe tranſactions. Then the defendant has over-ruled his plea by anſwering to the very parts, to which the plea goes: *Pope* v. *Biſh* (*c*). The anſwer goes on to ſtate, what is in the nature of a dilatory plea, that *Bond* is a neceſſary party. He has not anſwered the material charge; which if admitted, is ſufficient of itſelf to take the caſe out of the Statute.

Mr. Romilly in reply—In *Catling* v. *Skoulding* there is only a *dictum*. Merchants' accounts, if no tranſaction has paſſed within ſix years, are not taken out of the Statute by the exception. It is very doubtful, whether this can be conſidered a caſe of merchants' accounts: a gentleman poſſeſſing copper works; and employing an agent on them.

Lord CHANCELLOR—The plaintiff ſtates, that the other partners are dead; but not as an abſolute fact; but, that if they are not dead, the defendant by virtue of ſome arrangement is become ſolely liable to the partnerſhip debts. That is denied by the anſwer. Then, will the plea, that he, who ſays he is not ſolely anſwerable, has not promiſed within ſix years, ſufficiently nega-

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(*a*) 6 *Term Rep. B. R.* 193.

(*b*) 1 *Anſt.* 14.

(*c*) 1 *Anſt.* 59. See *Bayley* v. *Adams*, *Poſt*. 586.

tive, that ſome of the other perſons have not promiſed? Will that anſwer ſupport the plea?

Reply—It is only neceſſary to meet by averments thoſe allegations, that take the caſe out of the Statute; and the allegation is, that only the defendant promiſed. In *Blacket* v. *Langlands* any anſwer muſt have over-ruled the plea; as the plea was to all the relief and diſcovery: but this defendant muſt put in an anſwer. "In all theſe caſes if any matter is charged by the bill, which "may avoid the bar created by the Statute, that matter muſt be "denied, generally, by way of averment in the plea; and it "muſt be denied particularly and preciſely by way of anſwer to "ſupport the plea (*a*)." The reaſon is, that the plaintiff is entitled by Exceptions to compel the defendant to anſwer preciſely to all the caſes put, in this bill for inſtance, as exceptions to the Statute. It is not neceſſary in the plea to give the reaſon for ſaying, he is not indebted; and that is the reaſon, that there muſt be an anſwer; that the plaintiff may have the opportunity of excepting. In the averments of the plea it is only neceſſary to ſtate the fact generally, without deſcending to all the particulars. The allegation of this bill is merely, that the defendant admitted within ſix years, that he was indebted; not ſtating an admiſſion, that there were unſettled accounts.

Upon the objection, that the plea is over-ruled by the anſwer, the defendant has pleaded to the account and diſcovery of theſe partnerſhip dealings and tranſactions. But a diſtinct tranſaction is ſtated in the bill; that *Jones* lent the defendant 500 *l.*; and the note given for that ſum is loſt. That is ſtated as quite a diſtinct tranſaction. The defendant has not pleaded to the diſcovery of that; though above ſix years ago. It was never held, that where a plaintiff ſtates two demands, to each of which a plea of the Statute lies, he cannot uſe it as to one, and not as to the other. As to that diſtinct demand the defendant has not availed himſelf of the Statute; but has given the diſcovery. Upon this argument it muſt be taken, that the anſwer is ſufficient; as by excepting it may be made ſo: but that objection never can be uſed upon the argument of a plea.

(*a*) *Mitf.* 212.

1801. Jones v. Pengree.

As to the objection, that this is multifarious, the defendant muſt of neceſſity ſtate, that the cauſe of action did not ariſe within ſix years; and the *aſſumpſit* within ſix years, if charged, muſt be denied.

Mr. *Owen* obſerved, that the plea certainly extended to the tranſaction as to the 500*l*. by the words in the introduction "in his ſeparate capacity."

Lord Chancellor—My preſent opinion is, that this plea is not good. I think, the anſwer covers a great deal too much.

Dec. 26.

The plea was ordered to ſtand for an anſwer with liberty to except (*a*).

(*a*) See *Bayley* v. *Adams*, *infra*.

1802. Jan. 16.

(*a*) DOWNES *v.* THE EAST INDIA COMPANY.

Order for defendants to be at liberty to withdraw a demurrer ſet down to be argued, on payment of coſts to be taxed.

A motion was made on behalf of the defendants for liberty to withdraw a demurrer; which was ſet down to be argued.

Lord Chancellor made the order on payment of coſts, to be taxed.

(*a*) *Ex Relatione.*

Jan. 19.

BAYLEY *v.* ADAMS.

Plea of the Statute of Limitations, ſupported by an anſwer, ordered to ſtand for an anſwer, with liberty to except: the charges of the bill not being ſufficiently anſwered. Whether the charges of the bill muſt be met by way of averment in the plea, as well as by the anſwer, *Quære*.

The bill, which was filed by the executors of *Joſeph Winder* on the 20th of *February* 1801, ſtated, that the defendant from *June* 1771 till *November* 1775 employed *Winder* as his ſtock-broker, and alſo as his agent or banker in *London*; during which time the defendant tranſmitted Navy Bills to be ſold; for the produce of which as well as other remittances the defendant drew upon *Winder* from time to time: or otherwiſe ſuch produce was paid by *Winder* to him, when he came to *London*. On the 3d of *October* 1771 an account was ſettled; upon which a balance of 899 *l.* 16 *s.* 4 *d.* was due to the defendant. On the 17th of *January* 1772 they ſettled another account, which was ſigned by the defendant; upon which a balance of 90 *l.* was due to the defendant. From that time, though *Winder* ſent accounts from time to time, no farther account was ſettled between them until the 17th of *Auguſt* 1773; on which day another account was ſettled; upon which the balance due to the defendant was 168 *l.* 18 *s.* 11 *d.*

The bill farther ſtated, that though the laſt account was not ſigned by the defendant, it was admitted to be correct in various letters written by him and by *Anthony Adams*, his nephew, by his directions; particularly by a letter, dated the 27th of *November* 1775; wherein the nephew deſired *Winder* to ſend down his account from the 17th of *Auguſt* 1773 to that time, and his uncle would make remittances. *Winder* accordingly ſent the defendant an account up to the 13th of *November* 1775; by which a balance of 1002 *l.* 9 *s.* 1 *d.* appeared due to *Winder*.

The bill then ſtated, that, after the aforeſaid account had been ſo delivered to the defendant, *Winder* made repeated applications for payment of the balance by letters and otherwiſe; and the letters, which he wrote to the defendant from the end of *November* 1775, are now in the defendant's poſſeſſion or power: but the defendant, though he at times admitted, that the laſt mentioned account was correct, and that the balance of 1002 *l.* 9 *s.* 1 *d.* was due from him to *Winder*, yet under various pretences evaded the payment thereof; and he and *Benjamin Adams*, his ſon, by his advice, wrote ſeveral letters to *Winder*, in which they made the aforeſaid admiſſion; and fixed ſeveral different times for the defendant's coming to *London* and ſettling the ſaid account, and paying the balance; and the defendant was in *London* in *September* 1790; and he then under pretences, that there was ſome difference between his account and *Winder*'s, or ſome other pretences, prevailed on *Winder* to intruſt him with the vouchers for the payments, amounting to 14,313 *l.* 13 *s.* 7 *d.*, to examine; and he gave *Winder* a receipt for them, dated the 25th of *September* 1790; which is now in the plaintiff's poſſeſſion. *Winder* afterwards made repeated attempts to have the account ſettled and the balance paid to him by the defendant: but he was not able to accompliſh it; and particularly in his laſt illneſs, and a few days previous to his death, he cauſed the laſt mentioned account to be tranſcribed; and ſtruck the balance in his own hand; and it was his intention to have taken legal meaſures to enforce the payment: but he died, before he had an opportunity, on the 23d of *March* 1795.

The bill then ſtating, that the plaintiffs had ſeveral times applied to the defendant to ſettle the account, and pay the balance, and that he refuſes, ſometimes pretending, that no ſuch tranſactions had taken place, at other times, that he had paid the balance to *Winder*, charged the contrary; and that though the defendant frequently promiſed to pay the aforeſaid balance of 1002 *l.* 9 *s.* 1 *d.*, yet he never did in fact pay any part thereof to *Winder* in his life, but that the whole (with the exception of an error to the amount of 1 *l.* 7 *s.* 8 *d.*, charged to the defendant twice) was due to *Winder* at his death. The bill farther ſtated, that the defendant will at times admit that; but then pretends, that the plaintiffs are barred by the Statute of Limitations from recovering any part of the aforeſaid balance from him: whereas the plaintiffs charge the contrary; and that after the death of *Winder* the plaintiffs applied to *John Adams*, the ſon of the defendant, who reſides in *London*, for a ſettlement of the aforeſaid account; and the ſaid *John Adams*, who acted in that behalf as the agent of the ſaid defendant, informed the plaintiffs, that the ſaid defendant was equally deſirous with the plaintiffs to have the account ſettled; but, that the vouchers relating to it, and which had been delivered to the ſaid defendant by *Winder*, had been loſt; and he deſired to have a copy of the account, as made out and balanced by *Winder*, delivered to him; and he promiſed, it ſhould be examined and ſettled; and the plaintiffs farther charge, that they did cauſe a copy of the ſaid account to be made out and delivered to him; and he agreed to refer the ſaid account to arbitration, but afterwards receded from ſuch agreement; and refuſed to do ſo.

The bill then ſtating other pretences of errors, particularly an error of 1000 *l.* in the account ſettled and ſigned by the defendant on the 17th of *January* 1772 *Winder* not having given credit for the ſum produced by the ſale of a Navy Bill for 1000 *l.*, charged the contrary; and that the accounts were correct in every item; that the defendant was in *London*, when the ſaid Navy Bill was ſold; and the produce thereof was paid to him by *Winder*, and in ſupport of that charging, that it appears from the account ſettled on the 17th of *January* 1772, and the fact is, that *Winder* received from the defendant on the 8th of *January* 1772, the day, on which the ſaid Navy Bill was ſold, 81 *l.* 3 *s.*; for which as well as a ſmaller ſum received from him on the day the account was ſettled, *Winder* gave the defendant credit in the account; and therefore the defendant would have diſcovered the omiſſion of 1000 *l.*, and would not have ſigned that account, or ſettled and allowed the account of the 13th of *Auguſt* 1773, in which the ſum of 1 *l.* 7 *s.* 8 *d.* is again by miſtake charged for commiſſion on ſale of the ſame Navy Bill, had not the produce thereof been previouſly paid to him; and the plaintiffs farther charge, that the defendant never applied to *Winder* or made any demand for the produce of the ſaid Navy Bill; and that the defendant has made ſome entry in ſome of his books of account or memorandums of the receipt of the produce of the ſaid Navy Bill, amounting to 980 *l.* or thereabouts; and ſuch books, *&c.* are now in his cuſtody or power: but he refuſes to produce the ſame; and he has alſo in his cuſtody or power all the vouchers relating to the payment of the aforeſaid 14,318 *l.* 13 *s.* 7 *d.*, which were delivered to him by *Winder*.

The bill prayed an account of all the aforeſaid dealings, *&c.* and payment of what ſhall appear due; and that the ſaid vouchers may be delivered up.

The defendant put in a plea and anſwer. As to ſo much of the bill as ſtates, alleges, or charges, any accounts, dealings, or tranſactions, to have ſubſiſted, paſſed or taken place, between the defendant and *Winder*, and ſeeks to have any anſwer or diſcovery from the defendant touching all or any ſuch accounts, *&c.*, and as to the whole of the relief ſought or prayed by the bill, the defendant pleads the Statute of Limitations (*a*); and the defendant avers, that the cauſes of action or ſuit againſt the defendant in the ſaid bill ſtated, alleged or mentioned, or any of ſuch cauſes, did not ariſe or accrue at any time within ſix years next before the day of filing the ſaid bill.

And the defendant not waiving his ſaid plea, *&c.*, for anſwer to the reſidue of the ſaid bill, *&c.*, ſaith, he hath been informed, and believes it to be true, that his ſon *John Adams*, in the bill named, who reſides in *London*, and hath for ſome time occaſionally acted as the defendant's agent in *London*, was applied to by the complainants after the death of *Winder* for ſome ſuch purpoſe as in the bill mentioned: but this defendant doth not know, nor hath been informed ſave by the bill, nor doth believe, that the ſaid *John Adams* on that or any occaſion informed the complainants or any of them, that this defendant was deſirous to have the account in the bill mentioned ſettled; or that the vouchers relating thereto, and which are in the bill alleged to have been delivered to the defendant by the ſaid *Joſeph Winder*, had been loſt, or to that or any ſuch effect: nor doth the defendant know, nor hath been informed, ſave by the bill, nor doth he believe that the ſaid *John Adams* on being ſo applied to or on any occaſion promiſed, that the account in the bill mentioned ſhould be examined and ſettled, or to that or any ſuch effect.

Saith, he doth not know, nor hath been informed, ſave by the bill, nor doth believe, that the ſaid *John Adams* at any time or upon any occaſion agreed with the complainants to refer the accounts in the bill mentioned to arbitration.

Saith, that he never directed, empowered, or authoriſed, the ſaid *John Adams* to make any ſuch promiſe or requeſt as in the bill mentioned to the complainants, or to refer or agree to refer the accounts in the bill mentioned to arbitration; and the defendant denies all unlawful combination and confederacy in and by the ſaid bill charged.

Mr. Romilly and Mr. Johnſon in ſupport of the plea—The object of this bill is an account of tranſactions, which ended twenty-

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(*a*) 21 *James* 1. *c.* 16. *ſ.* 3.

ſix years before the bill was filed; which was only a month within the ſix years. The principal objection will be, that the facts ſtated in the anſwer ought alſo to be inſerted by way of averment in the plea. But why ſhould they be repeated? In *Pope* v. *Biſh* (*a*) and *Edmunſon* v. *Hartley* (*b*) it was on that ground held, that the anſwer over-ruled the plea. The firſt conſideration is, whether the bill contains any allegation of fact, that takes the caſe out of the ſtatute. Upon the bill there is no promiſe by the defendant or any perſon authoriſed for that purpoſe by him: the allegation is only, that the ſon of the defendant, acting without his authority as his agent, made the promiſe. The bill does not ſtate, that he had authority: or, that he had acted upon any other occaſion as agent of the defendant. As there is no allegation of that nature, no averment upon that ſubject is neceſſary in the plea.

If however that ſtatement in the bill is conſidered as taking the caſe out of the ſtatute, then upon the authority of the caſes in the Exchequer the denial by the anſwer is ſufficient, without alſo a denial by way of averment in the plea. The caſe (*c*) referred to in the paſſage in *Mitford* (*d*) againſt this does not contain any deciſion of the point, for which it is referred to. Since that caſe the general form of pleading this ſtatute has been, that the cauſe of action hath not accrued within ſix years; and that is correct; for it follows the ſtatute. There are certainly *dicta* in ſupport of the general propoſition ſtated by *Mitford*, that there muſt be denials by averment in the plea and alſo by an anſwer: but there is no authority for that; and it is inconſiſtent with the office of a plea, to reduce the cauſe to a ſingle point. Inſtead of ſhortening the cauſe a plea would have the effect of creating a neceſſity for double averments, by the plea and the anſwer. The caſe, in which it is neceſſary to have averments by the plea alſo, is, where thoſe facts make part of the equitable bar; as in the caſe of a purchaſe for valuable conſideration notice muſt be denied; for the purchaſe without that is not a bar. But there is nothing in this bill calling for any averment beyond the general one introducing the plea of the ſtatute. No ſpecial promiſe is alleged.

(*a*) 1 *Anſt.* 59.
(*b*) 1 *Anſt.* 97.
(*c*) 3 *Atk.* 70.
(*d*) *Mitf.* 212, 213.

alleged. As to *Edmundſon* v. *Hartley*, many caſes, in which the party has been permitted to plead the thing, which the bill ſeeks to ſet aſide, are ſtated by *Mitford* (*a*); as an award, a releaſe, *&c.*: but there is no authority for the poſition, that the circumſtances muſt be denied both by plea and anſwer.

Mr. Alexander and Mr. Pemberton for the plaintiff—The reaſon of the rule, upon which the firſt objection reſts, is, that the plea ſhould conſtitute a complete bar to the ſuit. Therefore the plea muſt by averment anſwer the charges, which, if true, would avoid the plea. That is the reaſon ſtated in *Mitford*. If the plaintiff takes iſſue upon the plea, and it does not contain a complete anſwer to the bill, the plea may be proved; and yet the caſe ſtated by the bill may entitle the plaintiff to ſucceed. The reaſon, upon which a denial by anſwer is alſo neceſſary is, that the averments of the plea need not follow the charge particularly. That muſt therefore be done by anſwer; in order that the plaintiff may have an opportunity of excepting. It is aſſumed, that the ſon acted as agent of his own authority: but it muſt be intended, that he acted as an agent properly conſtituted. The allegation is ſufficient to call for an anſwer; and therefore according to the rules of pleading it is ſufficient to call for averments by the plea. Another objection is, that there never was a plea of this kind without a denial of a promiſe within the ſix years, as at law, *non aſſumpſit infra ſex annos*, as well as, that the cauſe of action accrued within ſix years. All pleas of this ſort alſo contain an averment, not only, that there was no promiſe or cauſe of action within ſix years before the bill filed, but alſo, before any proceſs iſſued; and though the Act of Parliament (*b*) certainly requires the bill to be filed, before proceſs iſſues, the conſtant practice is otherwiſe; and the irregularity cured is by appearance. Some charges of this bill are not noticed either by the plea or the anſwer: one allegation, which by fair conſtruction may be ſuppoſed to include promiſes to *Winder*; that he made repeated applications for payment of the balance. It was neceſſary to aver by this plea, that the defendant had made no ſuch promiſe as is ſtated, and that his ſon was not authoriſed to ſettle the buſineſs. *Davie* v. *Cheſter* (*c*) and *Hoare* v. *Parker* (*d*) are expreſs authorities in ſupport of the poſition

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(*a*) *Mitf.* 209.

(*b*) Stat. 3 and 4 *Ann.* c. 16.

(*c*) *Mitf.* 217.

(*d*) *Mitf.* 217. 1 *Bro. C. C.* 578.

poſition in *Mitford*. The object of a plea is to bring a ſingle point in iſſue; and upon this plea theſe facts would not be in iſſue. The plea is alſo bad, as being both to diſcovery and relief. The Statute of Limitations clearly cannot be pleaded to the diſcovery of the time, when the cauſe of action accrued.

Mr. Romilly in reply—As to the diſcovery wanted, they may except to the anſwer. The conſtant practice is to plead the ſtatute to a bill for diſcovery merely. The laſt plea of this ſort (*a*) was both to diſcovery and relief; and no ſuch objection was taken.

The great objection is as to the neceſſity of averments in the plea. There is no judicial authority, that diſtinctly proves that, except *Davie* v. *Cheſter*. In the caſe in *Atkyns* (*b*) the objection was, that the defendant had not anſwered the circumſtances; not that he had not anſwered them by the plea; for which point it is referred to in *Mitford* (*c*). The ſame book refers to *Lingood* v. *Croucher* (*d*) and *Lingood* v. *Eade* (*e*). *Hoare* v. *Parker* does not in the leaſt apply. The plea was as to particular pieces of plate: but there was no general averment, that the defendant had not any other plate depoſited with him; though by his anſwer he denied, that he had any other. Conſequently the plea was not alone an anſwer to the bill; and the plaintiff was under the neceſſity of replying to both the plea and the anſwer. According to this argument iſſue muſt be taken upon a great number of points inſtead of one. Certainly a plea muſt be a complete anſwer to the bill; and therefore a plea of purchaſe for valuable conſideration muſt aver, that it was without notice: ſo the plea of an award to a bill to ſet it aſide for fraud muſt deny fraud: but the queſtion is, whether it muſt deny all the circumſtances, from which the plaintiff infers fraud. That is a very different queſtion. The plea of *non aſſumpſit infra ſex annos* at law muſt in ſubſtance be the ſame as, that the cauſe of action did not accrue within ſix years: otherwiſe, unleſs a cauſe of action aroſe upon the promiſe, it would not be a caſe within the ſtatute. The allegation of this bill as to the promiſe is not of a promiſe within ſix years. It is only neceſſary to meet allegations, that would take the caſe out of the ſtatute, not thoſe, that might by poſſibility have that

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(*a*) *Jones* v. *Pengree*, *ante* 588.
(*b*) 3 *Atk.* 70.
(*c*) *Mitf.* 213.
(*d*) 2 *Atk.* 395.
(*e*) 2 *Atk.* 501.

effect. What principle can there be for the diſtinction taken by the Court of Exchequer upon a plea of an award? All theſe pleas of awards, releaſes, *&c.* have been put upon the ſame ground. The objection to the allegation of the ſon's agency is, that the ſtatement, that he acted as agent, is not ſtating, that he was agent. If this plea is wrong, the defendant will have leave to amend.

Lord **Chancellor**—With regard to the merits, I ſhould feel a ſtrong inclination to let you amend this plea; for upon the ſtatement of the plaintiff nothing more is really in diſpute than whether credit was given in an account produced a great many years ago for the produce of a Navy Bill. The queſtion, whether the amendment is neceſſary, has introduced a great variety of very important conſiderations. If the reſult of the opinion ſtated in *Mitford* is accurate, it is very difficult to reconcile the two caſes in the Court of Exchequer with that reſult from the former caſes. Thoſe two caſes in the Exchequer ſeem to import, that this is the rule of pleading in equity; that, if a bill is brought to ſet aſide an award upon grounds admitting the award made, but ſeeking to cut down the effect of it by alleging grounds of partiality, and corruption, the defendant may plead the thing, the diſſolution of which is ſought by the bill; putting it in this form; that the plea ſhall merely aver the exiſtence of it, and contain no allegation in the body of the plea as to the circumſtances, upon which the award is impeached; but the defendant may expreſs what his conſcience ſuggeſts as to thoſe circumſtances, not in the body of the plea, but in an anſwer. The firſt difficulty upon that is how to conſider that Record filed by the defendant, conſiſting partly of what is called plea, partly of what is called anſwer, as in a correct ſenſe either a plea or an anſwer. The office of a plea in bar at law is to confeſs the right to ſue; avoiding that by matter dehors; and giving the plaintiff an acknowledgment of his right, independent of the matter alleged by the plea. The plea alleges ſome ſhort point; upon which, if iſſue is joined, there is an end of the diſpute. In this Court, in general caſes, not claſſed among thoſe, where certain averments ſeem to have been required both by the plea and the anſwer, but, where the defendant *pro hâc vice* for the ſake of the argument, admits the whole bill, I have underſtood the rule to be the ſame here as at law, that the plea admitting the bill interpoſes matter, which, if true, deſtroys

Office of a plea in bar at law to confeſs the right to ſue, and avoid it by matter dehors: ſo in this Court in general caſes.

The excepted caſes; where the plea muſt be ſupported by an anſwer.

deſtroys it; and upon the truth of which the plaintiff is at liberty to take iſſue. Caſes have ariſen, in which it has been thought neceſſary both to plead, and to repeat the aſſertions of the plea in an anſwer: that is, as it is technically expreſſed, the plea is ſupported by an anſwer. Thoſe caſes are very various; and I own, I ſhould have entertained an idea, before I heard of thoſe caſes in the Court of Exchequer, that, if a bill was filed to ſet aſide an award upon ſpecial circumſtances, the firſt difficulty would be upon the maxim referred to by the Report: "*Exceptio ejuſdem rei,* "*cujus petitur diſſolutio.*"

But it is true, that, not only upon awards, but releaſes, judgments, *&c.* the Court had admitted a plea, called a plea, though in its nature very different from the character of a plea in general caſes; for it is not, ſtrictly ſpeaking, admitting the fact ſtated, and by the effect of new matter, introduced by the defendant, getting rid of it, but admitting one fact in the bill, and either by plea, or by anſwer, or by both, ſetting up again that, which the bill ſeeks to impeach, by denying either in the plea, or the anſwer, or both, all the circumſtances, which the plaintiff admits, if truly denied, are ſufficient to bar the relief. The caſes in the Exchequer are confined to the plain caſe of an award; in which caſe, it is ſaid, you are at liberty to plead the award; in that ſenſe alleging ſomething, that meets the effect of the bill by the plea. But can that be ſaid, if you only admit the exiſtence of the inſtrument ſtated by the bill; which by the effect of the other circumſtances ſtated by the bill is impeached? If this were *res integra*, I ſhould have thought it more difficult to ſay, the defendant was bound to ſet out all the circumſtances by averment in the plea; and could fortify it by an anſwer denying thoſe circumſtances. Such a record is neither plea nor anſwer, but ſomething like a mixture of both, and very inaccurate. That this was the general idea is evident from the book, that has been referred to; which is the production of a very diligent and learned man, not once given to the world, or haſtily, but after ſearch and reſearch into every Record, and again given to the world by him. There is hardly one point of equitable proceedings with regard to pleas, with which it is not exceedingly difficult to reconcile thoſe two caſes in the Exchequer: for inſtance, what is ſaid in *Mitford* (*a*) as to a bill brought

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(*a*) *Mitf.* 197.

to impeach a decree on the ground of fraud uſed in obtaining it; that "the decree may be pleaded in bar of the ſuit, with aver-"ments" (in the plea, it appears by the context) "negativing the "charges of fraud, ſupported by an anſwer fully denying them." So of a judgment (*a*): "If there is any charge of fraud, or other "circumſtance ſhewn as a ground for relief, the judgment or ſen-"tence cannot be pleaded, unleſs the fraud or other circumſtance, "the ground, upon which the judgment or ſentence is ſought to "be impeached, be denied, and this put in iſſue by the plea, and "the plea ſupported by a full anſwer to the charge in the bill."

In the caſe of a ſtated account alſo (*b*) "If error or fraud are "charged, they muſt be denied by the plea as well as by way of "anſwer." So with regard to an award (*c*); which is the ſubject theſe caſes in the Exchequer more particularly allude to: "if fraud or partiality are charged againſt the arbitrators, thoſe "charges muſt not only be denied by way of averment in the "plea, but the plea muſt be ſupported by an anſwer, ſhewing the "arbitrators to have been incorrupt and impartial." Upon the Statute of Limitations (*d*): "where a particular ſpecial promiſe "is charged, to avoid the operation of the Statute, the plaintiff "muſt deny the promiſe charged by averment in the plea, as well "as by anſwer to ſupport the plea." So as to a purchaſe for valuable conſideration (*e*): "The ſpecial and particular denial of "notice or fraud muſt be by way of anſwer; that the plaintiff "may be at liberty to except to its ſufficiency. But notice and "fraud muſt alſo be denied generally by way of averment in the "plea; otherwiſe the fact of notice or of fraud will not be in "iſſue."

This is laid down here diſtinctly, and in many other books; for I have lately looked into the point for another purpoſe; and I think, I may ſay, whatever doubt may be expreſſed as to the neceſſity of denying by plea and anſwer, that there is no countenance for that upon the old authorities. Sir *John Mitford*'s idea is, that if you are to call this defence a plea, it muſt be ſuch that iſſue may be taken upon it as a plea; and if it is ſubſtantiated by evidence as a plea, there is an end of the cauſe. Where the de-

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(*a*) *Mitf.* 205. (*b*) *Mitf.* 208. (*c*) *Mitf.* 209. (*d*) *Mitf.* 212. (*e*) *Mitf.* 216.

fendant not ſtating merely matter *dehors*, but admitting part of the charge, gets rid of it by circumſtances, I do not know, that it might not be called a plea and anſwer: but that is a Record of a character very diſtinct from that, which is uſually called a plea.

With reſpect to the firſt of the caſes in the Court of Exchequer, I wiſhed to know, what was the event of it, after leave was given to ſtrike out the averments. If the plea had no part of that, which was contained in the anſwer, how could the plaintiff proceed upon that, ſo amended, as a plea? It admits the award, the very fact ſtated in the bill. Muſt it not be complete as a plea; and contain in itſelf all the allegations, which being proved are neceſſary to authoriſe a judgment for the defendant? To the Record ſo purged the character of a plea, technically ſpeaking, does not belong: neither can it technically be called an anſwer: but it is ſomething called a plea and anſwer; being in ſubſtance the ſame, as if the defendant had anſwered. It is impoſſible not to feel the authority belonging to theſe caſes. The point was decided upon reconſideration in the ſecond caſe; and therefore the queſtion, if this Record neceſſarily furniſhed it, would make it proper to conſider, whether the principles, upon which I have argued, are right or wrong; and whether the concluſion drawn in *Mitford*, not only as to one point, but upon every point, which analogy brings within the reach of argument, has been ill collected. In ſupporting this plea the Counſel have felt the difficulty of contending, that there muſt not be averments both by the plea and by anſwer.

As to amending the plea, if the averments in the plea were the ſame as the anſwer, and if the defendant cannot ſay a great deal more, I much doubt, whether the averments in the bill are ſufficiently denied. The allegations of applications to ſettle are certainly put very looſely in the bill: but I would take it to be a bill diſtinctly ſtating in effect, that the cauſe of action was gone much more than ſix years. The allegation as to the authority of the ſon I underſtand to mean this in legal conſtruction; that he acted at the time of the application as agent in the article of the ſettlement of accounts; and if ſo, it cannot be doubted, that the defendant authoriſing him within ſix years to act as his agent for the ſettlement of the accounts, would amount to a new *Aſſumpſit*; and take it out of the Statute. This therefore is a very material charge.

1802.

BAYLEY v. ADAMS.

charge. Obſerve, how the defendant anſwers. He does not ſtate, what ſort of agent his ſon was. As I conceive, he was bound to ſtate, whether he was the agent in the article of the ſettlement of accounts. There is no diſtinct anſwer to that. The concluding ſtatement, that he never authoriſed *John Adams* to make any ſuch promiſe or requeſt, or to agree to refer the accounts to arbitration, may be anſwering honeſtly, as he conceives the fact: but it may be falſe both in law and fact; for if he had admitted, that the other was agent for the ſettlement of accounts, what was the power of an agent ſo conſtituted is the conſtruction of Law upon the fact; and that mere appointment, if diſtinctly admitted, would take it out of the Statute; importing, that there were accounts to ſettle; and the direction and power, which the defendant ſuppoſes himſelf not to have given, would be implied in Law in that character. I have a ſtrong doubt therefore, whether the plea, if to be amended, muſt not be amended in ſubſtance, beyond merely throwing into it the allegations of the anſwer. But in ſuch a caſe I would not preclude the defendant from amending as to the averments in the plea; if any averments are neceſſary. The objection goes to this; that the plea would be good almoſt without averments in the plea or the anſwer; for if the plea is, that the cauſe of action did not ariſe within ſix years, and if a new *Aſſumpſit* ſhould be proved, then it does not contain that, upon which the party muſt go to iſſue effectually, and proving his caſe would be entitled to diſmiſs the bill. But that will not do; for this is a bill ſtating, that the cauſe of action aroſe a great while beyond ſix years; admitting, that, if that was all, the Statute would be an anſwer: but it ſtates alſo, that the reply to that is, that within ſix years a new tranſaction has taken place; which forms a new *Aſſumpſit;* upon which the plaintiffs ſay, they are entitled to the relief. It would be quite anomalous to go to iſſue upon a plea, the iſſue upon which muſt be quite unneceſſary, unleſs other circumſtances are brought forward, or to proceed in the ſuit without knowing by plea or by anſwer, whether the circumſtance to take the caſe out of the operation of the Statute has or has not exiſtence.

The caſe therefore muſt not be reduced to a deciſion upon the point, whether the averments muſt be both in the plea and the anſwer; as I think, if the averments were in both, they are not ſufficiently averted. Upon that point I will not ſay more than that it ſeems difficult to ſupport the two caſes in the Exchequer. If the defendant chooſes to amend the plea, or both the plea and the anſwer, I will not object to it; but he muſt anſwer much more fully, before I ſhall conſider it ſufficient.

The plea was ordered to ſtand for an anſwer, with liberty to except, except as to ſetting forth the accounts.

Ex parte HOOPS.

Jan. 22.

Enrolment of a Patent cannot be diſpenſed with for the purpoſe of preventing the ſpecification being made public.

After a Patent has paſſed, the time for enrolment cannot be enlarged without an Act of Parliament.

THE petition was preſented by the Patentee of an invention for making paper from ſtraw; and the object of it was, that the Lord Chancellor would diſpenſe with the enrolment, or, that ſome proviſion ſhould be made to prevent the ſpecification from being made public; ſuggeſting the danger, that foreigners might obtain copies of the ſpecification in conſequence of the enrolment.

Mr. Sutton and Mr. Roupel in ſupport of the petition.

Lord Chancellor—How can I do this? Either upon this or ſome other caſe in the laſt Seſſion a clauſe for this purpoſe was inſerted in an Act of Parliament; and upon the motion of Lord *Thurlow*, upon reaſons applying not only to that but to all caſes, and ſeconded by Lord *Roſslyn*, the clauſe was univerſally rejected; and rejected, as it appeared to me, upon very ſubſtantial grounds; in which I readily concur. As to the worth of the apprehenſion ſuggeſted, a man has nothing more to do than to pirate your invention in a ſingle inſtance; and he will then force you to bring an action; and then the ſpecification muſt be produced.

But with regard to the King's ſubjects a very ſtrong objection occurs; which makes it neceſſary, that the ſpecification ſhould be capable of being produced. They have a right to apply to the Patent Office to ſee the ſpecification; that they may not throw away their time and labour, perhaps at a great expence, upon an invention; upon which the Patentee might afterwards come with his ſpecification; alleging an infringement of his Patent; when if thoſe perſons had ſeen the ſpecification, they never would have engaged in their project. The enrolment is therefore for the benefit of the public.

It was then deſired, that the time, which would expire on the 17th of the next month, might be enlarged; in order that the petitioner might apply to Parliament.

Lord CHANCELLOR—I cannot do that, if the Patent has paſſed; for the Patent is void, if the proviſo is not complied with. You ſhould have applied to the Attorney General, before the Patent paſſed, for a longer time upon the ſpecial circumſtances. I cannot take the Great Seal from a Patent, and repeal it in the moſt eſſential point. It is a legal grant, with a proviſo for the benefit of all the King's ſubjects. You can do nothing, except by an Act of Parliament to enlarge the time mentioned in the proviſo.

Petition diſmiſſed.

Jan. 27.

Ex parte BLOXHAM.

Creditor having ſecurities of third perſons to a greater amount than the debt may prove and receive dividends upon the full amount of the ſecurities to the extent of 20*s*. in the pound upon the actual debt.

THE object of this petition was to have the order made by Lord *Roſslyn*, diſmiſſing a former petition (*a*), diſcharged; and that the petitioner may be permitted to prove and receive dividends under the Commiſſion againſt *Purdy*, in reſpect of the reſidue of the amount of the bill accepted by him, and indorſed to them by *Almond* as a collateral ſecurity for his debt, according to the prayer of that petition, undertaking to refund, in caſe the dividends under both Commiſſions ſhould exceed 20*s*. in the pound upon *Almond*'s debt.

(*a*) *Ex parte Bloxham, ante*, vol. 5. 448.

This petition was preſented in conſequence of the order (*a*) made upon the petition by the ſame parties in the bankruptcy of *Young* and *Glennie*.

The Solicitor General and Mr. Cox in ſupport of the petition inſiſted upon the laſt order, ſetting up the older caſes; obſerving, that this bill was the inducement of the petitioners to diſcount the others.

Mr. Mansfield for the aſſignees, being called upon by the Lord Chancellor, referred to Lord *Roſlyn*'s order.

Lord CHANCELLOR—There muſt have been ſome miſunderſtanding upon it; for the caſe is only this. A party wants to have a bill diſcounted. The banker refuſes to diſcount upon the credit of that bill only. The other ſays, he has in his hands another bill; and offers that as a ſecurity for the former. What is that but a right to prove againſt both eſtates, until 20*s.* in the pound has been obtained.

Ordered according to the prayer.

[(*a*) *Ex parte Bloxham, ante*, 449. See *Ex parte Leers*. *Poſt*.

Ex parte BARWIS.

Jan. 27.

Joint Commiſſion of Bankruptcy ſuperſeded on the ground of the infancy of one partner on the petition of the aſſignees under a ſeparate Commiſſion.

THE petition was preſented by the aſſignees under a ſeparate Commiſſion of Bankruptcy againſt one of two partners; praying, that a joint Commiſſion ſhould be ſuperſeded on the ground of the infancy of the other partner.

Mr. Cullen for the aſſignees under the joint Commiſſion admitting, that upon the application of the infant himſelf the Commiſſion muſt be ſuperſeded, ſuggeſted a doubt, whether it could upon the application of a third perſon.

Lord CHANCELLOR ſaid, he had no doubt of the authority of the Court to ſuperſede the Commiſſion.

1802.

Jan. 29.

Ex parte PEELE.

To make a partnerſhip liable to a demand in reſpect of a ſeparate tranſaction, an agreement muſt appear.

KIRK, a warehouſeman, carrying on buſineſs under the firm of *Kirk* and Company, being indebted to Sir *Robert Peele* for goods ſold, after that debt was contracted, entered into a treaty with *Ford*, a breeches maker, for forming a partnerſhip. About four months afterwards a Commiſſion of Bankruptcy iſſued againſt them. No articles having been executed, *Ford* diſputed the point of partnerſhip; which was tried at Law; and the partnerſhip was eſtabliſhed upon the evidence of acts done.

The object of this petition by Sir *Robert Peele* was to prove his debt, as a joint debt, carried into the partnerſhip accounts. In ſupport of the petition the affidavit of *Copeland* ſtated, that it was agreed, that the ſeparate debts of *Kirk* ſhould be aſſumed by the partnerſhip; that entries were made in the books with the knowledge of *Ford*, and particularly, that the goods furniſhed by the petitioner were entered at a reduced price. This was oppoſed by the affidavit of *Ford*, denying the agreement or even knowledge of theſe circumſtances.

Mr. Mansfield and Mr. Thomſon in ſupport of the petition—This debt may be proved as a joint debt upon the authority of *Ex parte Clowes* (*a*) and *Ex parte Bingham* (*b*). Otherwiſe the effect would be a groſs fraud.

Mr. Romilly for the aſſignees—The circumſtances, under which this partnerſhip took place, are, that *Ford* having ſaved 5,000*l.* by his buſineſs was applied to by *Kirk* to become a partner with him. The latter was to give a ſtatement of the buſineſs: but, before that ſtatement was given, *Ford* found himſelf by Law a partner, and ſoon afterwards in conſequence bankrupt: *Kirk* being clearly a bankrupt at that time. The point, upon which this claim is reſiſted, is, that *Ford* never conſented to take upon himſelf the debts of the old houſe; which upon the evidence he never did. It is not diſputed, that there were ſome entries in the books:

(*a*) 2 *Bro. C. C.* 595. 1 *Cooke's* B. L. 258. 551.

(*b*) 1 *Cooke's* B. L. 551.

books: but the queſtion is, whether *Ford* knew of any ſuch entries or ſuch books. It is admitted, that theſe goods were ſold long before this partnerſhip was in contemplation; and therefore upon the credit of *Kirk* alone. This debt clearly cannot be proved; unleſs the evidence goes a great deal farther, ſhewing an agreement to take to the debts or privity. It is not diſputed, that by agreement the debts of the former partnerſhip may be brought into the new partnerſhip: but there muſt be an expreſs agreement for it; and it is not of courſe. That has been decided in many caſes; of which the laſt is *Shirreff* v. *Wilks* (*a*). In that caſe there was no evidence, that *Robſon*, the new partner, did not know the tranſaction, nor on the other hand. Therefore, it was preſumed, that he did not know it. In this caſe, though it is ſworn by *Copeland*, that *Ford* knew it, that under the circumſtances is not to be credited. Joint debts unimpeached have been proved againſt *Ford* to the amount of 3,000*l.* He cannot therefore have any intereſt.

Mr. Mansfield in reply—This is a queſtion of fact upon the contradictory evidence of *Copeland* and *Ford*; the latter of whom is intereſted in reſpect of the ſurplus and the bankrupt's allowance; and the former unimpeached. There is no doubt, that the price of theſe goods ſtands in theſe books as a debt. The caſe cited was upon the naked circumſtances. The queſtion is, whether this is a debt ſo carried into the partnerſhip as to become a joint debt. The reſult of the evidence is, that the goods were transferred into the partnerſhip ſtock; and the price became a partnerſhip debt. It is not explained, how the capital of theſe partners was to be formed. It ſeems as if *Ford* was to bring in money. He advanced 1,500*l.* to *Kirk*; who muſt bring in that value in ſome way.

Lord CHANCELLOR—From this petition I could not collect the nature of the queſtion, that was to be argued. The goods were ſupplied upon the credit of *Kirk*, for any uſe he pleaſed, however improper. If he choſe to ſell or to give them to a perſon inſolvent the day afterwards, the petitioner could not have followed the goods; but muſt be contented with his action againſt

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(*a*) 1 *Eaſt.* 48.

No action of covenant but between parties.

Kirk. The *primâ facie* effect of carrying the goods into the partnerſhip at a different price would be a ſale by *Kirk* to the partnerſhip. It is not eaſy to conceive, why ſelling the goods to a partnerſhip, of which he was one member, ſhould alter the caſe; and it is admitted by all the caſes, that if the goods were ſold to the new partnerſhip for a farthing advance, if not a fraud, but taking it as a ſale, the goods could not be followed. It is ſaid, in theſe caſes if the partners agree, that the ſeparate debts due to each ſhould become the joint property in conſideration of both taking upon them the debts of both, that is an agreement between the partners, and binds the creditors; not at Law clearly; for the agreement of the two would not give a right of action to one; unleſs ſome old caſes could be ſupported; in which it was held, that an action of covenant might be brought by him, for whoſe benefit the covenant was made, as well as he, in whoſe name it was made: but thoſe caſes, I think, are not now Law. Though it is not argued, that ſuch an agreement binds the creditors at Law, it is ſaid, it binds all creditors, and gives benefits to ſome creditors, in bankruptcy. As to the fraud, he, who ſells upon credit, puts himſelf upon the *bona fides* of him, to whom he ſells; and there may be caſes, where the fraud is as great upon the ſeparate creditors as in a ſuppoſed caſe upon the joint creditors. It is mere accident, how the hardſhip falls. I agree, it is ſettled, that, if a man gives a partnerſhip engagement in the partnerſhip name with regard to a tranſaction, not in its nature a partnerſhip tranſaction, he, who ſeeks the benefit of that engagement, muſt be able to ſay, that, though in its nature not a partnerſhip tranſaction, yet there was ſome authority beyond the mere circumſtance of partnerſhip to enter into that contract, ſo as to bind the partnerſhip; and then it depends upon the degree of evidence. In *Shirreff* v. *Wilks* very ſlight evidence poſſibly might have been ſufficient to ſhew, that the partner knew, the ſtock had been ſold, and the benefit taken into the ſtock, in which he was partner, and therefore it was conſcientious, that he ſhould become liable for that. Slight circumſtances might be ſufficient, where in the original tranſaction the party to be bound was not a partner, but at the ſubſequent time had acquired all the benefit, as if he had been a partner in the original tranſaction; and it would not be unwholeſome for a Jury to infer largely, that that obligation, clearly according to conſcience, had been given upon an implied authority.

rity. So here, if this was a caſe, in which it was found upon the trial, that this man was a partner upon a long exiſting partnerſhip, with a regular ſeries of tranſactions, books, *&c.* a knowledge of what his partner had been doing might be inferred againſt him; that, which in common prudence he ought to have known. But that is not the caſe of this partnerſhip. It was a treaty. It is not even yet agreed, how the ſtock and partnerſhip were to be formed. In the courſe of that treaty *Ford*, ignorant of law, permits acts to be done, which the law holds to be partnerſhip acts. It is a very different conſideration, whether this man, ſo trepanned into a partnerſhip, had got regular books, *&c.*; and it is difficult to ſay, not only, that knowing this he had agreed to it, but that he knew it; in which caſe I am afraid he muſt be bound. That fact has not been ſufficiently inquired into. In a ſenſe the bankrupt certainly is an intereſted witneſs. It is alſo to be obſerved, that the joint creditors are alſo intereſted, thus. Here are joint creditors; who deal upon the ſuppoſition, that the ſtock in hand is acquired by theſe two perſons. Then ſeparate debts might have been aſſumed, which would have ſunk the dividend of the perſons dealing with them both to nothing.

The order directed a reference to the Commiſſioners to inquire, whether at the commencement of the partnerſhip any debts due from *Kirk* on account of his ſtock in trade were aſſumed, and any debts due to him carried into the partnerſhip, with the knowledge and aſſent of *Ford*.

LEE *v.* WILLOCK.

Jan. 21.
Feb. 1.

Upon a reference to the Maſter as to the fact of a perſon's death, the Report only ſtating the circumſtances, *viz.* abſence abroad fourteen years without any account of him, but not drawing the concluſion, it was referred back to the Maſter to ſtate whether he was dead at the time, when adminiſtration was granted; eſpecially as two years more had elapſed ſince the Report.

A PETITION was preſented by the plaintiff Mrs. *Lee*; claiming under a will two ſhares of a fund; one in her own right; the other as adminiſtratrix of her ſon *Charles Lee*, upon the preſumption of his death.

By a decree pronounced at the Rolls an inquiry was directed as to the fact of the death of *Charles Lee*. Upon that queſtion the Maſter did not draw any concluſion: but the Report ſtated the circumſtances; that *Charles Lee* went to *America*; that upon his arrival there a letter was received from him: and that ſince that period, which was fourteen years before the date of the Report, he had not been heard of. Since the date of the Report two years more had elapſed. No reaſon appeared, why he ſhould not have been heard of, if living.

Mr. Romilly and Mr. Steele in ſupport of the petition—Under the ſtatute of *Charles* 2 (*a*), ſeven years are ſufficient to raiſe a preſumption, that a perſon, upon whoſe life a copyhold is held, is dead. The Court may proceed by analogy to that; and accordingly in *Thorn* v. *Rolfe* (*b*) a perſon was preſumed dead, becauſe not heard of for ſeven years. In *Dixon* v. *Dixon* (*c*) the Court alſo acted upon ſuch a preſumption; and though the time in that inſtance was twenty-five years, no time has been fixed.

Mr. Lloyd and Mr. Hart for the defendants—In *Dixon* v. *Dixon* the Maſter, as in this caſe, not having drawn a concluſion, the Maſter of the Rolls ſent it back to him to draw a concluſion; which being, that the perſon was dead, the decree was made upon that.

Lord Chancellor—The evidence is ſtrong in favour of this preſumption. But I approve what I underſtand to have been always Lord *Alvanley*'s courſe, to make the Maſter draw the concluſion. It is ſingular, that the Court ſhould ſend ſuch a queſtion to the Maſter, and that he ſhould ſend it back to the Court. But in this inſtance if I ſhould determine it, it would be raſh; for above two years more have elapſed ſince the Report; and how can I know, that in that time ſome information might not have been obtained; which, if it was now before the Maſter, might induce him to form a concluſion one way or the other. At leaſt the addition of two years would make the preſumption ſtronger.

(*a*) 19 *Ch.* 2. *c.* 6.

(*b*) *Dy.* 185. *a. Moor.* 14. *Anderſ.* 20.

(*c*) 3 *Bro. C. C.* 510.

Lee v. Willock. *Feb.* 1.

Lord CHANCELLOR—I am quite ſatisfied, I cannot grant the prayer of this petition in the full extent, upon conſidering ſuch circumſtances as are ſtated to me. Firſt, the Maſter has not executed the order. He ought to have drawn the concluſion. Next, the order is not quite right; for the iſſue of fact to be tried, before this petition can ſucceed, is, whether *Charles Lee* died before the letters of adminiſtration were taken; for if he cannot be preſumed dead before that, I ſhall not have a proper repreſentative before the Court. It muſt therefore go back to the Maſter to ſay, whether *Charles Lee* was dead, when the petitioner became his perſonal repreſentative.

SINCLAIR *v.* HONE.

Rolls. *Feb.* 1.

A codicil expreſſed in the event of the teſtator's death, before he joins his wife, was executed after their ſeparation in the *Weſt Indies* upon his voyage for *England*. That voyage being prevented by accident, he joined her: they lived together there and in *England*, having returned together; and the teſtator having afterwards gone to *Corſica*, and thence to *Liſbon*, died there. The codicil was held to be contingent, and did not take effect under the circumſtances. Probate not concluſive; not being refuſed except in a plain caſe.

William Sinclair, by his will, dated the 30th of *January* 1795, after directing his funeral expences and debts to be paid with all convenient ſpeed after his deceaſe, gave, deviſed and bequeathed, to his wife *Auguſta Sinclair* one moiety of all the real and perſonal eſtate he ſhould die poſſeſſed of to hold to her and her own uſe, ſubject in the event of her marrying to the payment of 1000 *l.*, for the benefit of the children he might have, as therein mentioned. Then, after a farther proviſion for children, in caſe he ſhould not have a child living by his ſaid wife at the time of his deceaſe, or to be born after his deceaſe, or having iſſue by her they ſhall all happen to die before any of them ſhall attain twenty-one, or be married with conſent, as aforeſaid, then and in ſuch caſe he directed, that upon the deceaſe of the ſurvivor of his children 500 *l.* of the laſt bequeſt (the 1000 *l.* charged for his children in the event of his widow's marriage) ſhould be paid to his wife for her own uſe; and the other 500 *l.* among the children of his brothers *John* and *Duncan Sinclair*, living at the death of the ſurvivor of his children. Then after ſome other legacies he gave all ſuch property as he might die poſſeſſed of over and above all that is hereby diſpoſed of unto and amongſt all the children, which he might have living by his ſaid wife at the time of his deceaſe, together with his ſaid wife, the ſame to be divided amongſt his ſaid wife and children in equal proportions ſhare and ſhare alike; and he directed, that in caſe of his death during his reſidence in the *Weſt Indies*, and it ſhould be the will of his wife to remain there, his houſehold furniture ſhould be reſerved to her for her ſole uſe and benefit for her life, and after her deceaſe be diſpoſed of. He directed his freehold and leaſehold lands and property in *Dominica* to be ſold; and made ſome farther diſpoſitions in favour of his wife and his children in the event of his having children.

The teſtator afterwards made the following codicil:

> “ In caſe I die before I join my beloved wife *Auguſta Sinclair*
> “ I leave to her all my property 500 *l.* to my brother *Duncan*
> “ excepted to be paid to him when my beloved wife can ſpare it.
> “ In witneſs my hand in preſence of Captain *John Hall* and
> “ *Alexander Hall*, this 16th *May* 1795. *William Sinclair*.”

The teſtator died in 1798; having never had any iſſue; and in *Michaelmas* Term 1799 the bill was filed by *John Sinclair* and his children, and the children of *Duncan Sinclair*, claiming their legacies, againſt the teſtator's widow and her ſecond huſband, and *Duncan Sinclair*, and the executors and truſtees.

The defendant *Hone* and his wife, the teſtator's widow, inſiſted on the codicil as a revocation of the will.

By a decree at the Rolls an inquiry was directed, whether it was the intention of the teſtator at the date of the codicil to go to *England*, and for what purpoſe, and to return to *Dominica* at any and what time, and under what circumſtances; or whether it was his intention, that his wife ſhould follow and join him in *England*, or elſewhere under any and what circumſtances.

The Report ſtated, that the teſtator at the time of making his will and for many years preceding was ſtorekeeper to his Majeſty's Board of Ordnance in the iſland of *Dominica*; where he had fixed his reſidence. At the date of the codicil it was his intention to leave his wife at *Dominica*, and go to *England* for the purpoſe of obtaining promotion in the Ordnance Department, and alſo with a view to recover or ſecure the payment of a debt of 2000 *l.* and upwards; and it was his intention to return to *Dominica* and join his wife at his reſidence there, when he had finiſhed his buſineſs in *England*, unleſs his promotion had been elſewhere than at *Dominica* or in the *Weſt Indies*; in which caſe it is thought, the teſtator would not have gone back to *Dominica*; but would have required his wife to follow and join him in *England*, or, wherever elſe he had obtained promotion and a permanent ſituation. With the aforeſaid intention he took leave of his wife and family; and proceeded to the place, whence the packets ſailed for *England*; and while there and in hourly expectation of embarking he made the codicil. The packet by accident ſailing without him, he endeavoured to overtake her; but could not; in conſequence of which he returned to his houſe; where he lived with his wife and family during his ſubſequent reſidence in the iſland. In the courſe of the enſuing year the teſtator and his wife went together to *England*, and took a houſe and lived at *Shooter's Hill* ſome time; when the teſtator getting the appointment of Ordnance Storekeeper in *Corſica* repaired to that iſland about *April* 1796; leaving his wife reſident at his dwelling-houſe at *Shooter's Hill*. On the evacuation of *Corſica* he was ordered to *Liſbon* with the troops; whether he went; and was at length appointed Commiſſary and Paymaſter to the Artillery ſerving with the army in *Portugal*; and ſhortly after obtaining ſuch promotion died ſuddenly at *Liſbon*.

The cauſe coming on for farther directions upon this Report, the only queſtion was upon the conſtruction of the codicil; whether under the circumſtances diſcloſed by the Report it revoked the will.

The codicil was proved in the Eccleſiaſtical Court.

Mr. Piggott and Mr. Alexander for the plaintiffs—The codicil from the time the teſtator joined his wife became totally ineffectual. The defendants muſt contend, that the words "in caſe I die "before I join my beloved wife" mean, in caſe he dies abſent from his wife. It is impoſſible to reſiſt theſe plain, direct, words,

in

in effect a condition precedent. Suppoſe, he had died, while they were living at *Shooter's Hill*.

Mr. Richards, Mr. Romilly, Mr. Grimwood, and Mr. Hubberſty, for the defendants—This caſe is not like *Parſons* v. *Lanoe* (a); in which Lord *Hardwicke* conſidered the will as merely a proviſional, contingent, diſpoſition. This teſtator was about to undertake a voyage for the purpoſe of ſoliciting promotion; which was prevented by an accident. He had not departed from her for *England* at that time. He had not therefore left her. They came together to *England*. They lived here together. Then he goes to *Corſica*; then to *Liſbon*; and there he dies. It is not to be contended, that the words mean in caſe of any abſence: but the object was his death in the firſt abſence, that ſhould take place after the execution of that codicil. The words import preſent gift. The rational conſtruction is, that this is, not a contingent, but an abſolute, diſpoſition by a man foreſeeing the event of not joining his wife again; and the conſtruction may be, leaſt he ſhould never join her. It is not immaterial, that the Eccleſiaſtical Court have granted probate of this inſtrument.

Mr. *Piggott* in reply was ſtopped by the Court.

The Maſter of the Rolls—There is nothing in the objection upon the probate of this codicil granted by the Eccleſiaſtical Court. That is evident from the inquiry, that was directed. I do not ſay, there may not be a caſe, in which it would be the duty of that Court to refuſe probate; where the objection was ſo plain, that there could be no doubt; as in the caſe of *Parſons* v. *Lanoe*; where it was clear, that he had returned. In ſuch a caſe the Eccleſiaſtical Court might refuſe probate: the paper being clearly not intended to have effect in the event, that happened. But, where there is a doubt, to ſay, they may refuſe probate, merely becauſe in one poſſible event the inſtrument may be left inoperative, cannot be maintained. Upon that ground they would try every caſe upon the effect of a codicil. In the caſe of double legacies the ſecond may be only repetition. If that is determined, the codicil operates nothing. The Eccleſiaſtical Court are not to take upon themſelves the deciſion of that queſtion, before they grant probate. This therefore is totally different from the caſe ſuppoſed by Lord *Hardwicke* in *Parſons* v. *Lanoe*. But if I had more doubt upon it, after this decree, when it is ſtated, that the objection was made, and over-ruled, I would let the party take ſome other courſe, of appealing againſt this decree, as containing a nugatory reference.

(a) 1 *Veſ.* 189.

Then, as to the conſtruction of this codicil, one view, that has been taken at the bar, would diſpoſe of it at once; that it contains no condition; but is an abſolute and immediate bequeſt; that the meaning is, that the teſtator now being about to proceed upon the voyage now gives his wife the whole of his fortune. That would be infinitely too violent a conſtruction. The words are words of as poſitive and expreſs condition as can be. The queſtion is only, whether a contingency exiſts, or not; and I am of opinion, there was condition and contingency. Then has it happened? I wiſhed to have heard diſtinctly ſtated, by what motives the teſtator is ſuppoſed to have been actuated; for, if a clear and diſtinct intention appears, the Court would go a great way to carry it into effect, though perhaps not in words very accurately expreſſed. But if the Court is left at a loſs for the intention, there is a neceſſity for abiding by the words; for there is no motive for departing from them. This is an abſurd condition on the face of it; and no ſatisfactory reaſon has been aſſigned by any one for giving his wife the whole of his fortune, if he dies abſent from her, and only a part, if he lives to join her. But he choſe, and had a right, to make that condition, however abſurd. If no motive can be diſcovered, I muſt abide by the letter of the condition. This is ſuppoſed to be the ſame as if the teſtator had ſet down by his wife to make this codicil: but it appears from the Report, he had left her, and for a continuance, as he ſuppoſed; and a voyage was to intervene. Separated from her under thoſe circumſtances he makes this codicil. But he does join her, it is true, in the ſame iſland. It is true, that voyage, in contemplation of which he makes this codicil, never took place. But then what is the caſe I am to repreſent to myſelf, in which he would have ſaid, the contingency had happened; for if it has not happened by his joining her, could this have become ever contingent? It is ſuppoſed to mean the firſt ſeparation,

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ſeparation, that may take place: but it is clear, he had not in contemplation any future ſeparation. He was not thinking of a voyage to *Corſica*, or a voyage to be made twenty years afterwards. The argument would be juſt as good, if he had given up his intention of going to *England* altogether; and had lived twenty years with her upon the iſland; and had then made a voyage. That would have been in ſome reſpects a ſtronger caſe than this; for it would have been leaving her upon the iſland, and a recurrence to the ſame circumſtances. But this is totally different. He joins her; lives with her; and then takes a new voyage. Can I apply the codicil to that new voyage; taking it upon the ſtrict words? At leaſt it muſt have been upon the ſame ſort of caſe. This is a caſe he never thought of. Not knowing, what he meant, I muſt abide by the words; and then the condition has happened; and the codicil therefore does not take effect.

Conſequently the account muſt be taken according to the prayer of the bill.

Jan. 29. *Feb.* 5.

WALKER *v.* EASTERBY.

No order, that a plaintiff reſiding abroad ſhall give ſecurity for coſts; where there are co-plaintiffs reſiding in *England*.

AN order was obtained by the defendant, as of courſe by petition at the Rolls, that the plaintiff *Walker*, who reſided in *Guernſey*, ſhould give ſecurity for coſts, and that in the mean time the proceedings ſhould be ſtaid.

The defendant was proceeding by attachment in the Mayor's Court according to the cuſtom of *London*, for a balance of 180*l.*, in the hands of the other two co-plaintiffs, *Le Meſuriers*, belonging to *Walker*. The bill prayed an injunction.

Mr. Steele for the plaintiffs moved, that the order ſhould be diſcharged; inſiſting, that this was never done in ſuch a caſe; where there were more plaintiffs than one, and the others reſided in *England*, and in this inſtance in *London*.

Mr. Wetherell in ſupport of the order ſaid, the *Le Meſuriers*, being merely the Garniſhees, were only nominal plaintiffs.

There was a difference of opinion in the Regiſter's Office as to the practice. One of the Regiſters ſaid, there was no inſtance of an order upon one of the plaintiffs only to give ſecurity for coſts.

Lord CHANCELLOR obſerved, that the defendant has ſecurity for his coſts againſt each of the plaintiffs (*a*).

Feb. 5.

The motion having ſtood over, that the practice might be aſcertained, the Lord Chancellor referring to an inſtance, in which Lord *Hardwicke* in 1755 under ſimilar circumſtances diſcharged the order without coſts, made the ſame order in this caſe.

(*a*) *Lloyd* v. *Makeam, ante*, 145.

Ex parte HEATH.

Feb. 5, 6.

Bankrupt's certificate ſhall not be ſtaid, in order to give a perſon inſiſting on a right to ſtop *in tranſitu* an opportunity of proving, in caſe he ſhould fail in his action.

A PARCEL of cheeſe, to the amount of about 400 *l.*, was ſupplied by the petitioner on account of the bankrupt. The bankruptcy taking place ſoon afterwards, the petitioner got poſſeſſion of the cheeſe, before it reached the bankrupt; and inſiſted upon his right to ſtop it *in tranſitu.* The aſſignees contended, that under the circumſtances it could not be ſtopped *in tranſitu*; and offered to let him prove under the Commiſſion; which he refuſed. An action was brought; which was likely to be tried in about three weeks.

Under theſe circumſtances the petition prayed, that the bankrupt's certificate may be ſtaid; in order that, if the petitioner ſhould fail in the action, he may have an opportunity of proving his debt.

The Lord CHANCELLOR doubting, whether the certificate could be ſtaid at the inſtance of a perſon, who according to the

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right he now inſiſts upon is no creditor, the petition ſtood over for the purpoſe of endeavouring to find an inſtance.

Mr. Cox in ſupport of the petition not being able to produce an inſtance, the Lord Chancellor refuſed to make the order.

Feb. 6.

Ex parte MAWSON.

General inſpection of a bankrupt's books, for the purpoſe of getting rid of the certificate by proving gambling tranſactions, refuſed.

THE object of this petition was to get rid of a bankrupt's certificate; ſuggeſting gambling tranſactions; and for this purpoſe praying an inſpection of all the bankrupt's books. The Lord Chancellor had ordered the Secretary for bankrupts to look into the books for a particular inſtance ſuggeſted: but it was not found.

Mr. Johnſon in ſupport of the petition preſſed for farther inquiry, or at leaſt an affidavit, that the books contained nothing of that kind.

Lord CHANCELLOR—This is a point of great delicacy. A man gets his certificate; and a creditor, who will have nothing to do with the Commiſſion, deſires to ſee all the books, in order to defeat the certificate in this way.

Another point is, whether you have not ſlipped your time. I doubt very much, when the certificate has been allowed, and has its legal effect, whether a perſon, no creditor under the Commiſſion, can come in this way for a diſcovery; to obtain which he may file a bill. I do not think, you can get rid of a certificate, that has been obtained, in every caſe, in which you can ſtay a certificate.

VALE *v.* DAVENPORT.

Feb. 6.

One purchaſer not ſubſtituted for another without affidavit, that there is no underhand bargain.

UPON a ſale before the Maſter,—*Walter* was reported the beſt bidder at 1050*l.*

Mr. Weſtcote on behalf of the purchaſer, and—Griffith moved, that *Griffith* may ſtand in the place of *Walter*; and that *Walter* may be at liberty to pay the money into Court in the name of *Griffith*, and may be let into poſſeſſion from *Chriſtmas* laſt.

The motion was made on affidavit of ſervice of notice upon the plaintiff and defendant.

The Lord CHANCELLOR ſaid, that would not do without an affidavit, that there is no underhand bargain between them (*a*).

(*a*) *Rigby* v. *M'Namara, ante,* 515.

GREATOREX *v.* CARY.

Rolls. Feb. 8.

A widow not put to election between her dower and an annuity by the will of her huſband. For that the claim of dower muſt be inconſiſtent with the will.

SAMUEL GREATOREX by his will, duly executed to paſs real eſtate, gave and bequeathed to his wife the ſum of 150*l. per annum* ſo long as ſhe ſhould continue his widow and unmarried; and which ſaid annual ſum he deſired his ſaid executors would pay her half yearly out of the produce of his real and perſonal eſtate; which perſonal eſtate he deſired might be placed out at intereſt to aſſiſt his real eſtate in the payment of ſuch annuity, or ſo much of his perſonal eſtate as ſhould be neceſſary for that purpoſe; and he deſired, that the firſt payment of his ſaid annuity ſhould be made ſix months after his deceaſe.

The teſtator alſo gave and bequeathed to his wife all his houſehold goods and furniture, with all his plate, linen, and china, to and for her own uſe and benefit; and in the event of his dying without leaving any child he gave, deviſed, and bequeathed, all the reſidue of his real and perſonal eſtates unto his ſiſter *Ann Baker*, her heirs and aſſigns for ever.

The bill was filed by the teſtator's widow; claiming the annuity under the will and alſo her dower and freebench; and the accounts having been directed, the point came on upon farther directions.

The Report aſcertained the rental of the teſtator's freehold lands, at 100 *l.* a year; and that by the cuſtom of the manors, of which the copyhold eſtates were held, there was no freebench.

(*a*) *Mr. Lloyd and Mr. Thomſon for the plaintiff* inſiſted upon the caſes of *French* v. *Davies* (*b*), *Strahan* v. *Sutton* (*c*), and particularly *Forſter* v. *Cook* (*d*).

Mr. Piggott for the defendant attempted a diſtinction; that in this caſe the teſtator made the whole of his property one fund.

The Maſter of the Rolls—I do not ſee, how this caſe can be diſtinguiſhed from *Forſter* v. *Cook*. The eſtate in that caſe was given to truſtees upon truſt to pay the annuity to the wife: in this it is given directly to her. The queſtion in all theſe caſes is, whether the teſtator meant to give away his wife's dower; which he could not do directly. For that it muſt be ſeen clearly, that he meant to diſpoſe ſo, that, if ſhe ſhould claim dower, it would diſappoint the will. It muſt appear, that there is a repugnancy. Upon the whole I am clearly of opinion, that the plaintiff is entitled to dower (*e*).

(*a*) *Ex Relatione.* (*b*) *Ante*, vol. 2. 572. (*c*) *Ante*, vol. 3. 249.
(*d*) 3 *Bro. C. C.* 347.
(*e*) *Couch* v. *Stratton*, *ante*, vol. 4. 391. *Boynton* v. *Boynton*, 1 *Bro. C. C.* 445. and other caſes collected in Mr. *Sanders'* note, 2 *Atk.* 426.

AT the end of *Hilary* Term, in conſequence of the death of Lord *Clare*, Sir *John Mitford* having reſigned the Chair of the Houſe of Commons, ſucceeded Lord *Clare* as Lord Chancellor of *Ireland*; and was created a Peer of the United Kingdoms by the title of Baron *Redeſdale* of *Redeſdale*, in the County of *Northumberland*.

Ex parte HUGHES.
Ex parte LYON.
In the matter of *Dumbell.*

1801. *June* 6. 8.

Sale by aſſignees under a bankruptcy by auction to one of the creditors, previouſly conſulted as to the mode of the ſale, and contrary to an order, that a Receiver ſhould be appointed to ſell; another ſale was directed: the eſtate to be put up at the aggregate amount of the purchaſe money and the ſum laid out in ſubſtantial improvements and repairs; which were to be allowed in caſe of a ſale at an advance: but if no farther bidding, the purchaſer to be held to his purchaſe.

Aſſignee of a bankrupt inſtead of ſelling the eſtate taking a leaſe himſelf is anſwerable for profit or loſs.

JOHN DUMBELL was concerned with ſeveral other perſons in a bank at *Stockport;* and was alſo a ſeparate trader. In 1793 a ſeparate Commiſſion of Bankruptcy iſſued againſt him; and the petitioner *Thomas Lyon* and *Croſsfield* were choſen aſſignees.

The *Stockport* bank being inſolvent, in 1794 an agreement took place between the creditors of the bank, the partners in the bank, and the aſſignees of the bankrupt *Dumbell;* and it was agreed among other things, that the joint property ſhould be conveyed to truſtees for the benefit of the joint creditors; and the aſſignees under the Commiſſion againſt *Dumbell* ſhould out of his ſeparate eſtate in the firſt place pay the ſum of 15,009*l.* for the uſe of the joint creditors: then they were to pay *Dumbell*'s ſeparate creditors 20*s.* in the pound and intereſt; and to apply the ſurplus in payment of the partnerſhip debts. Deeds were executed accordingly. The aſſignees of *Dumbell* neglected to pay the 15,009*l.*; and in other reſpects miſconducted themſelves; and the joint creditors being diſſatisfied with them, and alſo with the conduct of the truſtees, to whom the joint property had been conveyed, filed a bill to have the truſts carried into execution. In 1799, no decree having been made, *Mangles* was by conſent appointed receiver of the joint property; with power to ſell.

The ſeparate property of *Dumbell* conſiſted partly of the reverſion of ſome corn mills at *Warrington,* and of ſome leaſehold cotton mills. At the date of the bankruptcy the cotton mills were of great value; and might have been ſold for a conſiderable ſum: but the aſſignees neglecting their duty, the mills were greatly diminiſhed in value; and were daily growing worſe. After various applications both in the cauſe and the bankruptcy an order was in *April* 1800 made in the bankruptcy, upon the petition of the bankrupt, appointing a Receiver of *Dumbell*'s ſeparate property;

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with directions to ſell, and to bring the produce into the bank. This order was not purſued: but it was agreed between the Solicitor for the joint creditors and *Mayer*, the Solicitor for *Dumbell*'s aſſignees, with the privity of the aſſignees, that the cotton and corn mills ſhould be ſold immediately by *Skynner* and *Dyke* by auction; and they were accordingly advertiſed for the 5th of *Auguſt* 1800. On that day *Lyon*, the aſſignee, and *Mayer*, the Solicitor, came from *Warrington*; and attended: but as the ſale of the corn mills was put off in oppoſition to their wiſhes, they were deſirous of preventing the ſale of the cotton mills; and with that view propoſed, that they ſhould be put up at 3,000*l.*, a ſum far exceeding the value. The Solicitor and thoſe concerned for the joint creditors, and alſo for ſeveral of the ſeparate creditors of *Dumbell*, were ſatisfied, that they were not worth much, if any thing, more than 2,000*l.*; and propoſed, that they ſhould be put up at that ſum. Pending this diſcuſſion in a private room, a little previous to the hour of ſale, Mr. *Hughes*, the principal joint creditor of the *Stockport* bank, *viz.* to the amount of above 19,000*l.*, went into the room; and being informed of the difference, and aſked his opinion, ſaid, he would abide by what Mr. *Dyke* thought right; who having heard both ſides was of opinion, that the premiſes ought to be put up at 2,000*l.*; and *Hughes* aſſented.

The cotton mills were accordingly put up at 2,000*l.*; with a declaration, that, if any one advanced upon that ſum, they would be knocked down to him. Several perſons were in the room; and *Lyon* and *Mayer* among them. After a conſiderable time, no one bidding, *Hughes* advanced 10*l.*, and was declared the purchaſer. No objection was then taken by *Lyon* and *Mayer*: but they afterwards ſignified, that they ſhould not acquieſce in the ſale. Though they both live at *Warrington*, they permitted *Hughes* to take poſſeſſion of the mills without interruption, and to lay out large ſums in repairs and laſting improvements. In *September* following *Mangles* was appointed Receiver of *Dumbell*'s ſeparate property; and he approved the ſale to *Hughes*; and was ſatisfied, that 2,000*l.* was as much as the property was worth. The aſſignees refuſing to deliver an abſtract to *Hughes*, to enable him to complete his purchaſe, he in *December* 1800 applied in the cauſe for an abſtract.

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The Lord CHANCELLOR directed that motion to ſtand over; in order that the aſſignees might preſent a petition in the bankruptcy. A petition was accordingly preſented by *Lyon*, the acting aſſignee; the object of which was to ſet aſide the ſale and to have the cotton mills reſold before a Maſter; ſuggeſting colluſion between *Hughes* and the Solicitor for the joint creditors; who were concerned in the ſale. Another petition was preſented by the ſeparate creditors of *Dumbell*; praying, that other mills, his property, may be ſold.

The Lord CHANCELLOR (*a*) ordered, that the ſale ſhould be ſet aſide; and that a reſale ſhould take place before the Maſter; and made no order upon an application of the Counſel for *Hughes* for an allowance for repairs and improvements.

The other petition was preſented by *Hughes* to ſet aſide that order; or otherwiſe to be allowed for repairs and laſting improvements.

Mr. Richards, Mr. Alexander, and Mr. Owen in ſupport of the petition of Hughes—Upon the general point, whether a perſon, who has adviſed the mode of ſale, and acted as agent, can be the purchaſer, when this ſort of queſtion aroſe upon the purchaſe of a truſtee for creditors, Lord *Hardwicke* in *Whelpdale* v. *Cookſon* (*b*) was of opinion, that the ſale ſhould ſtand, if affirmed by the majority of the creditors. That was recognized in the late caſe of *Campbell* v. *Walker* (*c*); in which caſe the rule was laid down by Lord *Alvanley* only to this extent; that *primâ facie* the thing was at an end; not, that an end might be put to it at any time. If the general propoſition is puſhed to the extent now deſired, it would go infinitely beyond any thing, that has ever been done. In *M'Enzie*'s caſe the perſon employed to ſell and to conduct the ſale was the purchaſer. If all the creditors muſt conſent, the conſequence would be very unfortunate. Suppoſe out of theſe ſeventy creditors ſixty-five were in favour of the ſale: the other

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(*a*) Lord *Roſslyn*.

(*b*) 1 *Veſ*. 9. Stated from the Regiſter's Book, *ante*, vol. 5. 682, in *Campbell* v. *Walker*.

(*c*) *Ante*, vol. 5. 678.

five might very abſurdly oppoſe it, or from ſome improper motive. Upon the circumſtances of this caſe it is very different from that of a truſtee; and here was acquieſcence. There is no pretence, that *Hughes* was acting in concert with the Solicitor, who was entruſted to ſell. *Hughes* is a private gentleman of fortune, reſiding in *Surrey*. Theſe mills were no object to him: but he was a large creditor, tired with the delays; and anxious, that the buſineſs ſhould be cloſed. When he entered the auction room he had not the moſt diſtant idea of bidding. The ſale was ſet aſide principally upon this; that the ſlight part he had taken in the private room cloathed him with the character of agent, or a perſon employed in ſelling. At all events he muſt be allowed the money laid out in repairs and improvements.

Mr. Pemberton for the creditors of the Stockport Bank expreſſed their wiſh, that the ſale ſhould be confirmed.

Mr. Mansfield, Mr. Lloyd, and Mr. Benyon, in ſupport of Lyon's petition—In *Hall* v. *Noyes* the ſale was ſet aſide upon the mere dry point, that the truſtee could not buy; though the ſale was clearly advantageous. At this ſale there was no other bidder than *Hughes*. He had notice, that evening, that the ſale could not ſtand. Having notice, that it would be impeached, it was his own folly to lay out money. The late Lord Chancellor was ſtruck with the circumſtance of his being in conſultation with theſe perſons before the ſale; and alſo, that he acted in concert with the Receiver; under whom by the authority of the Court the ſale ought to have taken place. *Hughes* appears a perſon conſulted, and adviſing as to the mode of the ſale. The ſale alſo, as conducted, was a violation of the order of the Court. Lord *Roſslyn* proceeded upon no other ground than the ſituation, in which *Hughes* ſtood: his own Solicitor preſent, and the parties contriving the manner of ſelling the eſtate; not upon the ground of undervalue, or, that the aſſignees did not concur. The reaſon of the general rule, that ſuch a ſale ſhall not ſtand, is the improper uſe, that might be made of a rule leſs ſtrict. The Court never can know the value. Upon the objection as to the Receiver, there may be a great deal of management to prevent a ſale by the Receiver.

Mr. Richards in reply—This purchaſer is not tenacious of his contract; being anxious only, that he may not be out of pocket: but the creditors are in favour of the contract; and have a right to retain it. To conſider this queſtion fairly, it muſt be ſuppoſed, that the creditors complain. *Hughes* was capable of being the purchaſer. He was not a truſtee. There is a manifeſt diſtinction between a truſtee to ſell and agents, ſervants, ſurveyors, *&c.* A truſtee is incapable of purchaſing, unleſs for the *ceſtuy que* truſt, not only upon conſiderations of general policy, but from the nature of the thing. In the common caſe of a truſt to ſell for the payment of debts, or for a diſtribution among infants, he muſt continue a truſtee for thoſe purpoſes. He cannot diſcharge himſelf by his own act. In that caſe it would be abſurd to ſuppoſe, he could ſell to himſelf. While the eſtate is in him, his character of truſtee continues. In point of law therefore it is impoſſible for him to purchaſe; and the conſideration he gives is not material. But the caſe of an agent is very different; and if the tranſaction is fair, no advantage taken, and he has given more than any other man will give, the Court, though looking at it with jealous eyes, will not ſet it aſide. The queſtion muſt always be, whether he has dealt fairly with his employer. The ground againſt him muſt be abuſe of confidence. He cannot ſay, as a ſtranger may, *caveant emptor et vendor*.

No concealed knowledge is imputed to this purchaſer. Every thing was communicated by the aſſignee. There was no poſſibility of miſrepreſentation by him and his ſolicitor in the converſation between them, who reſiding at a diſtance could know nothing accurately of the property, and the others, diſtinctly acquainted with it. Suppoſe, the ſale to *Hughes* had taken place in the private room, without going to the auction. It may be prudent, but there is no rule making it imperative upon a truſtee to ſell by auction. In many inſtances the mode of ſelling by auction would be miſchievous. Many people will not buy by auction; and property frequently will produce more by private contract; and even will not ſell by auction. In this ſort of caſe the queſtion muſt always turn upon the value; and upon the evidence this ſale was at a fair value. If a great majority of the creditors are in favour of the ſale, great attention ought to be

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paid to them; and they ought to be permitted to keep it notwithſtanding the oppoſition of one or two, perhaps very unreaſonable, and from malice. The alleged notice by the aſſignees was no more than refuſing at night to perform a contract executed in the morning. They are the perſons now applying. Shall they be heard, the creditors not moving? The aſſignees even took no ſtep, till forced on by an application for the abſtract. It is impoſſible, that *Hughes* ſhould not be repaid the money expended; by which alone the property is now of any value to the creditors.

Lord Chancellor—With reſpect to the application of the ſeparate creditors for a ſale of that property, with which *Hughes* has no concern, the bankruptcy happened ſo long ago as 1793. There ſeems to have been a ſpeculation upon the part of the bankrupts to ſave the wreck of their fortune, and upon the part of the aſſignees to promote their own intereſt; and with that view they ſeem to have laid aſide the law, and to have acted juſt as they thought proper; entering into contracts ſingular enough in their arrangement. One of the firſt tranſactions, inſtead of a ſale under the Act of Parliament, was a demiſe of theſe mills for nineteen years in conſideration of 16,000 *l.*: one of theſe leſſees, being one of the aſſignees under the Commiſſion, was incapable of that character; and if any benefit has been made by him from that ſituation, it will follow, that he muſt account for it; and if he has ſuſtained a loſs, he muſt take the conſequence of having done an act the Court cannot approve. The leſſees ſubdivided the premiſes at an annual rent; making a profit out of the bankrupt's eſtate by theſe tranſactions. The bankruptcy goes on through a vaſt maſs of irregular tranſaction to 1801; and then the creditors and the bankrupts begin naturally enough to complain, and ſtate, that, as it generally turns out, the management of the eſtate in this way is likely to end ruinouſly to all the parties. In Sir *George Colebrooke*'s caſe the aſſignees thought proper to huſband the eſtate; in hopes, that by the event of war or peace it might be brought to a better market: a conſiderable number of creditors aſſenting: but Lord *Thurlow* ſaid, it was not competent to any body of creditors to aſſent againſt individual creditors, however few in number; and ordered the eſtate to be brought to ſale forth-

Aſſignee of a bankrupt not juſtified in deferring a ſale; and in ſuch a caſe, if called upon to ſell, will incur the peril of anſwering any depreciation.

forthwith; and, as was intimated in that caſe, I wiſh to intimate in this, that if any individual creditor ſtated diſtinctly to this aſſignee, that he was diſſatisfied with his conduct, and called upon him to execute his truſt from time to time, and if the eſtate ſold for 2,000*l.*; and might, when the aſſignee was ſo called upon, have ſold for 7,000*l.* he would be in the peril of anſwering the difference.

Upon the other part of the caſe, I do not impute fraud to *Hughes*, even in the view of this Court: but it is impoſſible to permit him under the circumſtances to hold this purchaſe. On the other hand the Court is at liberty to hold him to the purchaſe as againſt himſelf. Upon a petition preſented by *Dumbell*, the bankrupt, whoſe intereſt, it muſt be remembered is conſidered as well as that of his creditors, complaining of all this irregular conduct in thoſe, who had the adminiſtration of his eſtates, and praying a prompt ſale of his ſeparate eſtates, the late Lord Chancellor thought, that upon the whole it was not adviſeable to do what there was ample ground for, if adviſeable, to remove the aſſignees; but directed a receiver to be appointed, to proceed to ſell the ſeparate eſtate, and to bring the proceeds into the Bank. This order made in *April* was baffled by delay. No receiver was appointed for a conſiderable period; and when appointed, he was a perſon, who from connexion with the bankrupt or ſome of them would have done well in declining the office. All parties being bound by this order, and having an opportunity of carrying it into execution, think it competent to them to have this ſale in *Auguſt*, before the Lord Chancellor had ceaſed to ſit; when an application for the purpoſe of ſanctioning the proceeding might have been made; not even making the ordinary condition in the terms of the ſale, that it ſhould be ſubject to his approbation. The ſale took place under the circumſtances now ſtated; *Hughes* making himſelf a party in the converſation, that was to determine the upſet price. He had a conſiderable intereſt; and I agree, his advice would have been very aptly and properly given, if he had not become a bidder. Perſons from *Warrington* attended in the auction room; who muſt know, that he was a conſiderable creditor; and was adviſed with; and probably knew, that he had been conſulted as to the terms, upon which it ſhould be put up.

The firſt queſtion is very conſiderable; whether *Hughes* could be permitted to bid. It is not neceſſary to give an opinion upon that: but I will go the length of ſaying, it is extremely difficult to ſuſtain in equity the title of a perſon dealing under the circumſtances, in which he then ſtood. If *Hughes* could bid, or the ſolicitor tendering the eſtate to ſale, or agents for the ſale, however conſtituted, and if the danger of that ſpecies of tranſaction is compared with the danger of a purchaſe by a truſtee, the Court would overlook a danger far more conſiderable than that, at which it looks with ſo much anxiety. But I do not agree, that this Court goes upon the formal principle, that has been ſtated, as diſtinguiſhing the caſe of *Hughes*; though that would do at law. It is not however neceſſary to decide upon that: but upon the diſobedience to the orders of the Lord Chancellor, in ſupport of the authority of the Court, I muſt hold, that this ſale cannot be permitted to ſtand.

It is a different thing to ſay, that *Hughes* ſhould be at liberty to have it reſcinded. If the Court thinks proper to hold him to it, he has no right to ſay, he ſhall not be bound. If no money had been laid out in repairs, the proper order would be for a ſale before the Maſter, and that the eſtate ſhould be put up at the ſum of 2,010*l.*; and if no one ſhould bid above that ſum, that he ſhould be held to his bargain. That would ſolve the queſtion as to the creditors conſenting. The queſtion as to the repairs is of ſome difficulty; and on that account I am afraid to go the length of determining, that he ſhould not be entitled to the value of the ſubſtantial improvements made, at the hazard upon a queſtion of conſiderable doubt of doing ſubſtantial injuſtice. Suppoſe, the aſſignee, inſtead of mingling himſelf in the ſale, had kept the property; and had *bonâ fide*, with an honeſt view of improving it, expended in the repairs of the machinery a conſiderable ſum, which had been added to the purchaſe money: it would be hard dealing not to allow that to the aſſignee. I am the more diſpoſed to think this right, recollecting, that in *M'Enzie*'s caſe the Houſe of Lords did allow him the value of improvements of all kinds, even in the inſtance of a manſion houſe erected, and plantations of ſhrubs, *&c.*

The proper order therefore upon theſe petitions will be a reference to the Maſter to inquire, what ſum of money *Hughes* has laid out *bonâ fide* in ſubſtantial improvements of the property; and that the eſtate ſhall be ſold before the Maſter; and one condition of the ſale ſhall be, that it ſhall be put up at a price conſtituted by the ſum of 2,010*l.* and the amount of the ſum ſo laid out upon ſubſtantial improvements; that if it ſells for more, *Hughes* ſhall be paid out of the produce the amount of the ſubſtantial improvements. Declare, if no one bids beyond that amount, that in that caſe it is for the intereſt of all the creditors and the bankrupt, that *Hughes* ſhall be held to his purchaſe. Direct the other property likewiſe to be ſold before the Maſter; and reſerve the coſts of all theſe proceedings; with liberty for any of the parties to apply after the ſale.

The reſult of the account was, that *Hughes* had expended upwards of 6,000*l.* in repairs and improvements. The premiſes were accordingly put up before the Maſter at the aggregate ſum, above 8,000*l.* No one advanced upon it. *Hughes* was therefore held to his purchaſe; and upon the 21ſt of *December* 1801 the Maſter's Report was confirmed upon petition (*a*).

(*a*) See *Ex parte Lacey*, and *Liſter* v. *Liſter*, the two next caſes.

Ex parte LACEY.

Feb. 3. 5.

As to a purchaſe by a truſtee of the truſt property the rule is, that it ſhall not prevail under any circumſtances, unleſs the connection appears ſatisfactorily to have been diſſolved (a tranſaction to be viewed with great jealouſy from the opportunity of acquiring knowledge as truſtee) or by univerſal conſent. But as againſt him it ſhall ſtand; as if more cannot be obtained. The rule applies to all agents, and moſt ſtrictly to aſſignees in bankruptcy from their great power.

In this inſtance, that of an aſſignee, another ſale was directed: the premiſes to be put up at the price he gave; and if no more bid, his purchaſe to ſtand. As he had bought them in at a former ſale at a higher price, when there was another bidder to a greater amount than the final purchaſe, *Quære*, how the aſſignee is to be charged as to that difference.

Aſſignee of a bankrupt purchaſing dividends is a truſtee for the creditors or bankrupt according to the circumſtances.

A banker receiving the money under a bankruptcy ought not to be an aſſignee.

The ſubject of this petition was ſtrong charges of miſconduct by aſſignees under a Commiſſion of Bankruptcy executed in the country; one of whom was a banker; into whoſe bank the money was paid. Another of the aſſignees was himſelf the purchaſer of part of the bankrupt's eſtate, ſold under the Commiſſion; and he alſo purchaſed from ſome of the creditors their dividends. The eſtates in queſtion, conſiſting of three lots, were twice put up to ſale. At the firſt ſale the aſſignee was the purchaſer at 420*l.*; another perſon, bidding *boná fide*, having gone to 415*l.* The aſſignee having them again put up ſome time afterwards was at the ſubſequent ſale again the purchaſer at 375*l.* The Solicitor for the Commiſſion appeared at the ſale bidding for the aſſignee.

Mr. Romilly in ſupport of the petition.

Mr. Richards and Mr. Stratford for the aſſignees ſaid, perſons were miſled by the rule, as laid down in *Whichcote* v. *Lawrence* (*a*); not, that a truſtee cannot buy from the *Ceſtuy que truſt*; but, that he, who undertakes to act for another in any matter, ſhall not in the ſame matter act for himſelf; and therefore a truſtee to ſell ſhall not gain any advantage by being himſelf the perſon to buy.

LORD CHANCELLOR.—The rule I take to be this; not, that a truſtee cannot buy from his *Ceſtuy que truſt*, but, that he ſhall not buy from himſelf. If a truſtee will ſo deal with his *Ceſtuy que truſt*, that the amount of the tranſaction ſhakes off the obligation, that attaches upon him as truſtee, then he may buy. If that caſe is rightly underſtood, it cannot lead to much miſtake. The true interpretation of what is there reported does not break in upon the Law as to truſtees. The rule is this. A truſtee, who is entruſted to ſell and manage for others, undertakes in the ſame moment, in which he becomes a truſtee, not to manage for the benefit and advantage of himſelf. It does not preclude a new contract with thoſe, who have entruſted him. It does not preclude him from bargaining, that he will no longer act as a truſtee. The *Ceſtuys que truſt* may by a new contract diſmiſs him from that character: but even then that tranſaction, by which they diſmiſs him, muſt according to the rules of this Court be watched with infinite and the moſt guarded jealouſy; and for this reaſon; that the Law ſuppoſes him to have acquired all the knowledge a truſtee may acquire; which may be very uſeful to him; but the communica-

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(*a*) *Ante*, vol. 3. 740. See page 750.

tion of which to the *Ceſtuy que truſt* the Court can never be ſure he has made, when entering into the new contract, by which he is diſcharged. I diſavow that interpretation of Lord *Roſslyn*'s doctrine, that the truſtee muſt make advantage. I ſay, whether he makes advantage, or not, if the connection does not ſatisfactorily appear to have been diſſolved, it is in the choice of the *Ceſtuy que truſts*, whether they will take back the property, or not; if the truſtee has made no advantage. It is founded upon this; that though you may ſee in a particular caſe, that he has not made advantage, it is utterly impoſſible to examine upon ſatisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine caſes out of an hundred, whether he has made advantage, or not. Suppoſe, a truſtee buys any eſtate; and by the knowledge acquired in that character diſcovers a valuable coal-mine under it; and locking that up in his own breaſt enters into a contract with the *Ceſtuy que truſt*: if he chooſes to deny it, how can the Court try that againſt that denial? The probability is, that a truſtee, who has once conceived ſuch a purpoſe, will never diſcloſe it; and the *Ceſtuy que truſt* will be effectually defrauded. In the caſe of *Fox* v. *Mackreth* (*a*), ſo much referred to upon this ſubject, and now become a leading authority, in which I have now Lord *Thurlow*'s own authority for ſaying, he went upon a clear miſtake in diſſolving the Injunction, it was never contended, that if *Fox* in a tranſaction clear of ſuſpicion, but which, as I have ſtated, muſt be looked at with the moſt attentive jealouſy, had diſcharged *Mackreth* from the office of truſtee, he would not have been able to hold the purchaſe. Why? Becauſe being no longer a truſtee he was not under an obligation not to purchaſe. But we contended, that it was not in the power of *Fox* to diſmiſs him; that the truſt was accepted under an expreſs undertaking to the friends of *Fox*, that the truſtee ſhould not be diſmiſſed without their privity; that *Fox* himſelf had too much imbecility of mind as to theſe tranſactions; and we contended, that between the dates of *Mackreth*'s taking upon himſelf the character of truſtee and purchaſing he had acquired a knowledge of the value of the eſtate by ſending down a ſurveyor at the expence of the *Ceſtuy que truſt*; which was not communicated to the *Ceſtuy que truſt* even at the moment of the ſuppoſed diſſolution of the

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(*a*) 2 *Bro. C. C.* 400.

relation between them; and under thoſe circumſtances we contended, that *Mackreth* remained a truſtee. This was the principle, upon which the cauſe was decided. Either that cauſe ought to have been decided in favour of *Mackreth*, or this Court originally and the Houſe of Lords finally were right in refuſing an iſſue to try, whether the eſtate was of the value *Mackreth* gave or of a greater value at that time. Upon this principle that was an immaterial fact; for, if the original tranſaction was right, it was of no conſequence, at what price he ſold it afterwards; if the original tranſaction was wrong, *Mackreth* not having diſcharged himſelf from the character of truſtee, if an advantage was gained by the moſt fortuitous circumſtance, ſtill it was gained for the benefit of the *Ceſtuy que truſt*, not of the truſtee.

Upon theſe principles it is perfectly clear, that an aſſignee under a Commiſſion of Bankruptcy, a truſtee to ſell for the benefit of the creditors and of the bankrupt, cannot buy for his own benefit. In *Whelpdale* v. *Cookſon* (*a*), I underſtand, Lord *Hardwicke* did confirm the ſale, in caſe the majority of the creditors intereſted ſhould not diſſent. With all humility I doubt the authority of that caſe; for if the truſtee is a truſtee for all the creditors, he is a truſtee for them all in the article of ſelling to others; and if the jealouſy of the Court ariſes from the difficulty of a *Ceſtuy que truſt* duly informing himſelf, what is moſt or leaſt for his advantage, I have conſiderable doubt, whether the majority in that article can bind the minority. That queſtion does not ariſe upon the ſtate of facts in this caſe.

Executor cannot buy the debts for his own benefit.

As to the purchaſe of the debts by the aſſignee, as aſſignees cannot buy the eſtate of the bankrupt, ſo alſo they cannot for their own benefit buy an intereſt in the bankrupt's eſtate; becauſe they are truſtees for the creditors. In that reſpect there is no difference between aſſignees and executors; who cannot for their own benefit buy the debts of the creditors. I do not ſay, there may not be caſes of that kind, in which in a moral view the tranſaction between the executor and the creditor may not be blameable: but the Court muſt act upon general principles. Conſider the prodigious power of aſſignees, connected with Solicitors under the

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(*a*) 1 *Veſ*. 9. ſtated from the Regiſter's Book, *ante*, vol. 5. 682. in *Campbell* v. *Walker*.

Commiſſion, and bankers, receiving the money, over the creditors and the bankrupt. Unleſs the policy of the Law makes it impoſſible for them to do any thing for their own benefit, it is impoſſible to ſee, in what caſes the tranſaction is morally right. But it is enough to ſay, the aſſignee was a truſtee for the benefit of thoſe entitled to the intereſt in the reſidue. He muſt buy for them, and not for himſelf. Therefore as to the debts bought this aſſignee muſt be a truſtee either for the creditors or for the bankrupt; for which upon the circumſtances is doubtful yet. If perſons, who are truſtees to ſell an eſtate, are there profeſſedly as bidders to buy, that is a diſcouragement to others to bid. The perſons preſent ſeeing the ſeller there to bid for the eſtate to or above its value do not like to enter into that competition. It is the duty of the Solicitor to the Commiſſion in point of Law to inſiſt, that the aſſignee ſhould make the utmoſt value. In this caſe the Solicitor had two intereſts, drawing him different ways. Lord *Kenyon* in *Twining* v. *Morrice* (a) thought, the ſale might be prejudiced by the mere circumſtance, that the agent for the vendor appeared as a bidder. That is going a great way: but it ſhews, that the Court is in the habit at leaſt of ſtrictly regarding ſuch a circumſtance. It may be a material prejudice, even if he ſays, he bought it in. For inſtance, in *Kirton*'s caſe lately 23,000*l.* was *bonâ fide* bid; and the eſtate was bought in by the agent for the vendor. Afterwards there was another ſale in the Maſter's office; and the conſequence of that circumſtance, deterring others from bidding, was, that the eſtate finally ſold for 7,000*l.*, a depretiation contrary to all experience. So this very eſtate, ſold before to this aſſignee for 420*l.*, at that ſale produced a real bidder at 415*l.*: but being bought in was afterwards ſold again to the ſame aſſignee for 375*l.* He cannot hold that purchaſe: but I am called upon to charge him with the ſum of 420*l.* Upon that I have great heſitation as to what I ought to do; not being ſure, what will be the effect of the precedent. Suppoſe, inſtead of this ſmall difference, it had been the caſe of an eſtate with a coal-mine, as it was in *Kirton*'s caſe, and the unauthoriſed biddings of the aſſignees had occaſioned ſuch a loſs as there was in that inſtance, I ought to conſider long, whether that loſs ſhould fall upon the creditors. I wiſh to conſider farther upon the part of the caſe; as, though the

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(a) 2 *Bro. C. C.* 326.

1802. Ex parte Lacey.

the value is ſmall in this inſtance, it is of great importance as a precedent. I wiſh aſſignees to underſtand from this, that they are not to buy in without the privity of the creditors at leaſt; admitting, that this aſſignee in buying acted honeſtly, meaning to act for the benefit of the creditors and fairly. As to the particular deſire of the bankrupt, I admit, they are to have conſiderable regard to the deſire of the bankrupt: but that is not to be carried too far; and this diſtinction muſt be attended to; whether it is for his own benefit, or honeſtly intended for the benefit of his creditors; in which latter caſe it may have conſiderable weight.

With reſpect to the purchaſe of theſe three lots I ſhall hold him to the purchaſe as againſt himſelf, but not in his favour. I ſhall therefore make the ſame order, that I made in another bankruptcy (*a*); that an account ſhall be taken of the rents and profits from the time of the purchaſe; that theſe lots ſhall be ſold again; being put up at the ſum of 375*l.*: if any one bids more, the aſſignee ſhall not have them; and if not, he ſhall take them; reſerving my opinion upon the queſtion, how he is to be charged as to the difference in the amount of the two ſales; and declaring him a truſtee as to the dividends purchaſed; being clearly of opinion, that an aſſignee cannot under any circumſtances buy a debt for his own benefit (*b*).

Upon

(*a*) *Ex parte Hughes*; *Ex parte Lyon*; the preceding caſe. See *Liſter* v. *Liſter*, the following caſe. See alſo *Ex parte Reynolds*, *ante*, vol. 5. 707.

(*b*) Other caſes of the ſame nature, that occurred about this time, *Ex parte Tanner*, *Ex parte Attwood*, and *Owen* v. *Foulkes*, received the ſame determination: The Lord Chancellor repeating theſe principles; and declaring the general rule, that no truſtee ſhall buy the truſt property, until he ſtrips himſelf of that character, or by *univerſal* conſent has acquired a ground for becoming the purchaſer; and that the rule is to be more peculiarly applied with unrelenting jealouſy in the caſe of an aſſignee of a bankrupt; adding, that it muſt be underſtood, that, whenever aſſignees purchaſe, they muſt expect an inquiry into the circumſtances.

Owen v. *Foulkes* was upon a purchaſe by the Solicitor in the cauſe, a bill by creditors; the purchaſe perfectly fair; the Solicitor bidding openly in the preſence of very reſpectable perſons concerned for mortgagees and creditors; and declaring, it was for himſelf; the ſale at that time alſo being neceſſary: but the general rule prevailed.

The Lord Chancellor obſerved upon *M'Ennie's* caſe, that the courſe of ſale under an order of the Court of Seſſion in *Scotland* is this. They ſet a value upon the property; which

Upon the other circumſtances appearing in this petition the Lord Chancellor alluded to the caſe (*a*) from *Worceſter*, and another from *Briſtol;* obſerving, that the miſchief is enormous; and ſome means muſt be found to prevent bankers from having concern with the legal part of the execution of a Commiſſion of Bankruptcy.

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which they call the upſet price; which is obtained by a perſon, called a common agent; who by evidence procures all the information he can; upon which a judgment is formed as to the real value. In *M'Enzie's* caſe the ground, upon which the Houſe of Lords after a great number of years ſet aſide a purchaſe by the agent, was, that he, who was to inſtruct the Court how to ſell, ſhould not buy under the authority of the Court.

His Lordſhip added, that he always thought what Lord *Thurlow* ſaid was very wiſe; that there is no caſe, in which it is uſeful upon general principles, that the ſame Solicitor ſhould be employed on all ſides: in many caſes it is a great ſaving of expence certainly: but, where property is to be brought to ſale, to pay creditors, *&c.*, great miſchief is occaſioned by it.

(*a*) *Ex parte Edwards, ante*, 3.

Rolls.
Feb. 17. 24.

LISTER *v.* LISTER.

General rule upon a purchaſe of truſt property by the truſtees on their own account, that at the option of the *ceſtuy que truſt* it ſhall be reſold; being put up at the price, at which the truſtees purchaſed: who, if there is no advance, ſhall be held to their purchaſe.

THE ſubject of this bill was a purchaſe by truſtees for infants of ſome lots, part of the truſt property. The ſale was by auction. The truſtees bid on their own account; and were declared the purchaſers. The bill prayed, that the ſales may be declared void; and that the eſtate may be reſold.

The truſtees by their anſwer inſiſted, that they had given the beſt price for the lots they purchaſed, that could be obtained.

Mr. Richards and Mr. Johnſon for the plaintiffs referred to the late caſes (*a*) before the Lord Chancellor; in all which his Lordſhip took the ſame courſe, as a general rule; that the eſtate ſhould be put up again at the price, at which the truſtee purchaſed; and if no more was bid, he ſhould be held to his purchaſe.

(*a*) See *Ex parte Hughes, Ex parte Lyon, Ex parte Lacey, ante*, 617. 625. he further
James's Case 8 Ves jun 337.

Mr. Cox for the defendants—There ought to be an inquiry, whether the lots were ſold fairly and at the utmoſt value. It certainly muſt now be admitted, that they cannot hold a beneficial purchaſe: but they may hold it, if no better price could be got at the time. The reaſon of the reſiſtance is, that in conſequence of this ſale the eſtate has been much benefited by paying off mortgages and bonds, carrying intereſt at 5 *per cent.* No fraud is proved. It would be a ſtrong thing in ſuch a caſe to hold, that the eſtate ſhould keep the benefit ariſing from paying off theſe debts, and then undo the tranſaction from the beginning.

Mr. Richards in reply—Some expreſſions in Lord *Roſslyn*'s judgment in *Whichcote* v. *Lawrence* (*a*) led to ſome doubt as to the univerſality of the rule. But in *Ex parte Lacey* (*b*) the Lord Chancellor ſaid, that part of the caſe was miſunderſtood by us; and upon looking into the words accurately I think ſo. In *Campbell v. Walker* (*c*) the rule is laid down by Lord *Alvanley*, that a truſtee purchaſing the truſt property is liable to have the purchaſe ſet aſide, if in any reaſonable time the *Ceſtuy que truſt* chooſes to ſay, he is not ſatisfied with it. In a ſubſequent caſe, before the Court of Exchequer, a caſe of creditors, the bill was delayed twelve years; but the Court made the decree; holding, that the laches could not apply to a body of creditors. In all the late caſes the Lord Chancellor took the ſame courſe, as a general rule, in oppoſition to *Whelpdale* v. *Cookſon* (*d*).

The Maſter of the Rolls—Such an inquiry as is prayed by the defendants was never directed. The Court has never gone ſo far by implication to countenance the tranſaction. The very circumſtance, that the lot is knocked down to the truſtees, proves, that no better price could be got at the time. That therefore, if it is to prevail, would make every ſale to a truſtee good.

The rule is a rule of general policy, to prevent the poſſibility of fraud and abuſe; for it may not always be poſſible to know,

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(*a*) *Ante*, vol. 3. 740. See page 750. (*b*) The preceding caſe.

(*c*) *Ante*, vol. 5. 678.

(*d*) 1 *Veſ.* 9. Stated from the Regiſter's book, *ante* 682. in *Campbell* v. *Walker*.

whether the property was underſold. I was not aware, that the Lord Chancellor had laid down a general rule as to the terms; that the property ſhould be ſet up again at the riſk of the truſtee. It is a very important conſideration, whether that is to be taken as a general rule. If it is, I muſt adhere to it: but if it turns upon ſpecial circumſtances, I ſee no ſpecial circumſtances in this caſe. Theſe lots muſt be reſold at all events. The only queſtion is, whether they ſhall be put up at the price, at which the truſtees purchaſed.

Feb. 24.

The cauſe having ſtood over, the Maſter of the Rolls ſaid, he had mentioned it to the Lord Chancellor; and his Lordſhip ſaid, he meant to lay down a general rule; and underſtood, it had been ſo eſtabliſhed in Lord *Thurlow*'s time.

The decree was therefore made in conformity to the preceding caſes.

WATKINS v. LEA.

Feb. 8.

By the cuſtom of the manor of *Broadwas* and *Doddenham*, in the county of *Worceſter* the eſtates ſituate within the manor are held of the lords by copy of Court Roll; and according to the cuſtom are granted by copies of Court Roll for two lives in poſſeſſion and two in reverſion upon truſt for the perſons beneficially intereſted; and are deviſeable by the perſons beneficially intereſted without any ſurrender to the uſe of the will; but in caſe of inteſtacy are not deſcendible to the heirs: but are diſtributable as perſonal eſtate; and on the death of any life and ſurrender of the other lives then in being and payment of the cuſtomary fines, the lords of the manor have made new grants by copies of Court Roll

An eſtate held by copy of Court Roll, according to the cuſtom of the for lives manor, but in caſe of inteſtacy diſtributable as perſonal eſtate, and in other reſpects differing from copyhold, paſſed under a reſiduary bequeſt of the perſonal eſtate, not with copyhold eſtates under a general deviſe of all freehold and copyhold meſſuages, lands, &c. with limitations in ſtrict ſettlement, upon the whole will and the circumſtances.

for two lives in poſſeſſion and two in reverſion for the benefit of the perſons beneficially intereſted.

At a Court Baron, held for the ſaid manor on the 23d of *October* 1775, *Gregory Watkins*, a cuſtomary tenant of the manor, being then the only life in poſſeſſion, ſurrendered; and *Joſiah Lea* and *Thomas Smith* ſurrendered the reverſion of the ſame eſtates; and the lords of the manor granted to the ſaid *Gregory Watkins* and to the ſaid *Joſiah Lea*, in truſt for *Gregory Watkins*, to ſurrender, when by him, his executors, adminiſtrators, or aſſigns, required, the ſaid premiſes; to hold the ſame unto *Gregory Watkins* and *Joſiah Lea* upon truſt as aforeſaid for the term of their lives and the life of the longeſt liver ſucceſſively according to the cuſtom of the manor; and *Gregory Watkins* gave to the lords certain fines; and was admitted tenant; and at the ſame Court the lords granted to *Thomas Smith* and *John Smith*, in truſt for *Gregory Watkins*, to ſurrender, when by him, his executors, adminiſtrators, or aſſigns, required, the reverſion of the ſame premiſes; to hold upon truſt as aforeſaid for the term of their lives and the longer liver ſucceſſively according to the cuſtom, immediately after the deceaſe, ſurrender, or forfeiture, of *Watkins* and *Lea*; and *Watkins* gave other fines on that occaſion.

Gregory Watkins being ſo ſeiſed, and being alſo ſeiſed in fee ſimple of freehold eſtates in the counties of *Worceſter*, *Stafford*, and *Somerſet*, and of copyhold eſtates of inheritance in the county of *Stafford*, and a ſmall copyhold eſtate of inheritance in the manor of *Hagley* in the county of *Worceſter*, and poſſeſſed of leaſehold and perſonal eſtates, and having duly ſurrendered all his copyhold eſtates of inheritance, except the ſaid eſtate within the manor of *Hagley*, to the uſe of his will, by his will, dated the 31ſt of *October* 1787, and duly executed to paſs real eſtates, directed, that all his debts ſhould be fully paid; and ſubject thereto, after giving ſeveral annuities and legacies, gave to *Joſeph Lea* and *Gregory Watkins* 100*l.* a-piece, to be paid at the end of twelve months after his deceaſe, if they were then capable to give a releaſe, or otherwiſe, when they ſhould become capable thereof; to the payment of all which legacies and annuities he ſubjected as well his perſonal as real eſtates, if his perſonal eſtate ſhould be inſufficient to diſcharge the ſame. He gave and deviſed to his kinſman *John Watkins* all and ſingular his freehold and copyhold meſſuages, lands, tenements, and hereditaments, whatſoever, ſituate in the ſeveral counties of *Worceſter*, *Stafford*, and *Somerſet*, or elſewhere within the kingdom of *Great Britain;* to hold to him and his aſſigns for the term of his natural life without impeachment of waſte; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of *John Watkins* in tail male; with ſeveral remainders over in the ſame manner in ſtrict ſettlement, and the ultimate limitation to the right heirs and aſſigns of the teſtator for ever.

The teſtator then, after giving ſeveral ſpecific legacies to *William* and *Joſiah Lea*, gave the ſeveral ſums of 100*l.* and 50*l.* upon truſt to pay the former ſum to the Treaſurer or the Governors of the *Worceſter* Infirmary and the latter to the Treaſurer of the Charity School in *Kidderminſter*; which ſaid ſums of 100*l.* and 50*l.* he thereby charged upon his perſonal eſtate, and willed the ſame to be paid thereout, and applied towards carrying on the charitable deſigns of the ſaid ſocieties; and he gave and bequeathed all the reſt, reſidue, and remainder, of his perſonal eſtate and effects whatſoever after payment of his juſt debts, legacies, and funeral expences, to *William* and *Joſiah Lea*, ſhare and ſhare alike; and he appointed them executors.

The teſtator died in 1789. The bill was filed by *John Watkins*, the firſt deviſee for life, claiming under the will, and particularly praying, that the grants of the copyhold eſtates within the manors of *Broadwas* and *Doddenham* might be declared to have been in truſt for the benefit of the plaintiff and the other perſons entitled to the freehold and copyhold eſtates under the will; which was the only queſtion.

The defendants, the reſiduary legatees, by their anſwer ſuggeſted, that when a feme covert becomes beneficially intereſted in ſuch copyhold premiſes, the huſband may ſell the ſame without the concurrence of the wife, unleſs ſhe happens to be one of the perſons, for whoſe lives the ſaid premiſes are granted; and that, although ſuch premiſes are held by copy of Court Roll, yet the perſons beneficially intereſted therein may diſpoſe of ſuch intereſt by deed and without any ſurrender in Court.

Mr. Mansfield, Mr. Alexander, Mr. Romilly, and Mr. Horne, for the plaintiff, and Mr. Richards for a defendant in the ſame intereſt—Theſe eſtates, notwithſtanding the peculiarities of their tenure are clearly copyhold; paſſing by ſurrender, though it is ſuppoſed not uſual to ſurrender them, and held by copy of Court Roll, according to the cuſtom of the manor. The teſtator deviſes all his copyhold eſtates. There is no doubt, that under a deviſe of all the deviſor's freehold eſtates, or a general deviſe of lands, *&c.* an eſtate held for lives would paſs; and why ſhould not copyhold eſtates ſo held paſs under a general deviſe of copyhold eſtates? This is not like the caſes, in which it has been contended, that leaſeholds for years would paſs under a general deviſe of all lands, *&c.* Here certainly is a variety of limitations, which properly apply only to eſtates of inheritance: but that it is not an uncommon circumſtance: teſtators not adverting to it. There are many caſes of leaſehold eſtates in conſequence of clear unequivocal words coupled with real eſtates for the purpoſe of being carried on as far as the rules of law and equity will permit, notwithſtanding words of limitation not ſtrictly applicable to ſuch eſtates. This is as like a perpetual eſtate as can be from the number of lives and the habit of renewal. The circumſtance, that the charitable legacies are charged upon the perſonal eſtate, ſhews, that the teſtator conſidered this as real eſtate. The reſidue of the perſonal eſtate given to the *Leas* muſt be ſuch perſonal eſtate as he had charged with thoſe legacies; that could not be charged upon real eſtate; and which therefore muſt not be taken to be included. The defendants muſt contend, that this eſtate, though held by copy of Court Roll according to the cuſtom, is not copyhold, merely becauſe in caſe of inteſtacy it is deviſable as perſonal eſtate. An eſtate held for lives, though by the Act (*a*) diſtributable as perſonal eſtate, does not on that account loſe its deſcription. This is a mere queſtion of intention. The caſe of *Roſe* v. *Bartlet* (*b*), and thoſe, which have followed it, will be relied on, from the circumſtance, that the limitations are inapplicable. But this teſtator has deviſed a great number of real

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(*a*) Stat. 14 Geo. 2. c. 20.

(*b*) Cro. Char. 293.

eſtates, freehold and copyhold, not diſtinguiſhing any of them; meaning the limitations therefore to apply to thoſe eſtates only, to which they are applicable. But it has been decided, that this circumſtance alone will not do: *Addis* v. *Clement* (a), *Lane* v. *Lord Stanhope* (b). This eſtate is always renewable; like that in *Addis* v. *Clement*. Though there never has been a deciſion againſt *Roſe* v. *Bartlet*, the Courts of late have not been diſpoſed to favour it: *Lowther* v. *Cavendiſh* (c), *Turner* v. *Huſler* (d); in both of which *Roſe* v. *Bartlet* was not treated with much reſpect. *The Attorney General* v. *Andrews* (e) is very applicable. This teſtator had no copyhold eſtate in *Worceſterſhire*, that could paſs by the will, except this: the only other copyhold he had in that County not being ſurrendered to the uſe of the will. The defendants attempt to take under this will, not as cuſtomary heirs; inſiſting, that the teſtator intended to give his copyhold eſtate by a bequeſt of his perſonal eſtate, not by the deviſe of his copyhold eſtate.

Mr. Lloyd and Mr. Cox for the defendants, the reſiduary legatees—This caſe was fully argued before the late Lord Chancellor; who conſidered it ſo doubtful, that he never came to a concluſion upon it. This eſtate is nominally copyhold: but ſubſtantially it is only a freehold leaſe to a perſon, his executors, adminiſtrators, and aſſigns, for the lives of others. It has no quality applicable to copyhold eſtate. It is liable to debts; and paſſes without ſurrender; and has never been the ſubject of Recovery. If a man is poſſeſſed in right of his wife, it paſſes by the huſband's conveyance without any examination of the wife. The expreſſion of the truſt is to ſurrender, when by him, his executors, adminiſtrators or aſſigns, required. The legal eſtate could not paſs to the tenant for life; but muſt remain in the truſtees. In *Addis* v. *Clement* and *Turner* v. *Huſler* the eſtate was occupied with others; and the latter was upon a demiſe of tithes out of that very eſtate. Lord *Roſslyn* threw out an opinion, that *Addis* v. *Clement* might be right upon that ground; that the eſtates had been occupied together; an inference ariſing from that ſort of union, that the teſtator might have intended them to go toge-

(a) 2 *P. Will.* 456.
(b) 6 *Term Rep. B. R.* ~~334~~ 345.
(c) *Amb.* 356.
(d) 1 *Bro. C. C.* 78.
(e) 1 *Veſ.* 225.

ther. This caſe does not afford the leaſt circumſtance of that kind. Theſe eſtates were never occupied with the copyholds of inheritance or the freehold. There is no contiguity, and no reaſon to imagine, he meant theſe eſtates to be enjoyed together. The limitations are perfectly inapplicable. If a ſon of the tenant for life ſhould live an inſtant, his father would take this eſtate abſolutely as his adminiſtrator: it never could go with the eſtates of inheritance; and the will would be diſappointed. The laſt limitation in this will is to the right heirs of the teſtator. That would be the old intereſt of the teſtator in ſo much of the property as is undiſpoſed of; and that would not have gone to the heir: this property being limited to him and his executors. The argument is fair, that, where he meant a ſtrict ſettlement, he meant thoſe capable of being ſo limited: but as to the perſonal property an abſolute gift was intended; and no limitation. If this had been a leaſehold eſtate, and the deviſe general of all lands, &c., the ſame argument would have applied; and according to the laſt caſe, *Thompſon* v. *Lawley* (*a*), which ſeems full as well conſidered as any of the others, it would have gone into the perſonal eſtate. That would do no violence to the intention. The words are ſufficiently ſatisfied. Upon ſuch an eſtate as this it is abſurd to ſpeak of impeachment of waſte, truſts to preſerve contingent remainders, &c. The will is ſatisfied by his having freehold eſtates in one County and copyhold in another copyhold of inheritance, which may be ſuppoſed intended to paſs. It has always been held a conſiderable argument, that the copyhold eſtate was ſurrendered to the uſe of the will. *The Attorney General* v. *Andrews* is not applicable; amounting only to this; that the Court would get rid of the want of ſurrender in the caſe of a younger child. *Roſe* v. *Bartlet* and all the other caſes contained words, that looked like an intention to paſs all the teſtator had: but the limitations being inapplicable, the Court thought, it could not be intended, if there was ſufficient to ſatisfy the will without that eſtate. This will has nothing more ſpecial in it ſhewing an intention to paſs this, than in the wills in *Thompſon* v. *Lawley* and *Sheffield* v. *Lord Mulgrave* (*b*). Here is copyhold eſtate, in its nature deviſeable, and which he has ſhewn he meant to deviſe; having ſurrendered it to the uſe of his will. This is a copyhold

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(*a*) *Ante*, vol. 5. 476. 2 *Boſ.* and *Pul.* 303.

(*b*) *Ante*, vol. 2. 526. 5 *Term Rep. B. R.* 571.

eſtate, but of a perſonal nature. The ſtrong ground is, that the limitations are wholly inapplicable, an argument, upon which *Sheffield* v. *Lord Mulgrave*, *Doe* v. *Buckner* (*a*) and many other caſes turned; admitting, that the eſtate might paſs under circumſtances. Another head of caſes has been treated in the ſame manner; upon the queſtion, whether under the general words "all my eſtate" an eſtate held by the teſtator as a bare truſtee paſſed (*b*). The late Lord Chancellor looked at the limitations; and where the ſubject was real eſtate, hampered with limitations, which could not be ſuppoſed applicable to a truſt eſtate, held, that it could not be included; and that ſeems alſo to be Lord *Alvanley*'s opinion (*c*).

Mr. Manſfield in reply—This teſtator meaning to give every copyhold eſtate he had in any part of the kingdom could not have uſed words more appropriate. The argument, that the limitations are inapplicable, a circumſtance common in diſpoſitions of freehold and leaſehold eſtates, is too ſlight to defeat the general intention, expreſſed in the plaineſt words. What reaſon could he have as to the charitable legacies, but that he knew, they could not be charged on his real eſtate? *Roſe* v. *Bartlet*, *Thompſon* v. *Lawley*, and the other caſes of that claſs, do not apply here. It is very different to decide, that a general deviſe of all lands, with a deſcription applicable to eſtates of inheritance, will not include leaſehold eſtates, and that a deviſe of all and ſingular his copyhold eſtates will not include copyhold eſtates. Land and leaſehold are frequently contradiſtinguiſhed in the weſtern part of the kingdom. When the caſe of *Sheffield* v. *Lord Mulgrave* came back, conſiderable doubt was entertained as to the deciſion of the Court of *King's Bench*; and Lord *Roſlyn* would not act upon it. Certainly there was ſomething very particular in that caſe with regard to the renewal of the leaſe, directed only in a particular event. The deciſion at law went merely upon this; that the particular direction as to the renewal might be what was meant by the words "hereinafter mentioned and deviſed." In

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(*a*) 6 *Term Rep. B. R.* 610.

(*b*) *Ex parte Brettell*, *ante*, 571. The *Attorney General* v. *Buller*, *ante*, vol. 5. 339. and the references.

(*c*) The *Duke of Leeds* v. *Munday*, *ante*, vol. 3. 348. and the note, *ante*, vol. 5. 341. to *The Attorney General* v. *Buller*.

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ther. This caſe does not afford the leaſt circumſtance of that kind. Theſe eſtates were never occupied with the copyholds of inheritance or the freehold. There is no contiguity, and no reaſon to imagine, he meant theſe eſtates to be enjoyed together. The limitations are perfectly inapplicable. If a ſon of the tenant for life ſhould live an inſtant, his father would take this eſtate abſolutely as his adminiſtrator: it never could go with the eſtates of inheritance; and the will would be diſappointed. The laſt limitation in this will is to the right heirs of the teſtator. That would be the old intereſt of the teſtator in ſo much of the property as is undiſpoſed of; and that would not have gone to the heir: this property being limited to him and his executors. The argument is fair, that, where he meant a ſtrict ſettlement, he meant thoſe capable of being ſo limited: but as to the perſonal property an abſolute gift was intended; and no limitation. If this had been a leaſehold eſtate, and the deviſe general of all lands, *&c.*, the ſame argument would have applied; and according to the laſt caſe, *Thompſon* v. *Lawley* (*a*), which ſeems full as well conſidered as any of the others, it would have gone into the perſonal eſtate. That would do no violence to the intention. The words are ſufficiently ſatisfied. Upon ſuch an eſtate as this it is abſurd to ſpeak of impeachment of waſte, truſts to preſerve contingent remainders, *&c.* The will is ſatisfied by his having freehold eſtates in one County and copyhold in another copyhold of inheritance, which may be ſuppoſed intended to paſs. It has always been held a conſiderable argument, that the copyhold eſtate was ſurrendered to the uſe of the will. *The Attorney General* v. *Andrews* is not applicable; amounting only to this; that the Court would get rid of the want of ſurrender in the caſe of a younger child. *Roſe* v. *Bartlet* and all the other caſes contained words, that looked like an intention to paſs all the teſtator had: but the limitations being inapplicable, the Court thought, it could not be intended, if there was ſufficient to ſatisfy the will without that eſtate. This will has nothing more ſpecial in it ſhewing an intention to paſs this, than in the wills in *Thompſon* v. *Lawley* and *Sheffield* v. *Lord Mulgrave* (*b*). Here is copyhold eſtate, in its nature deviſeable, and which he has ſhewn he meant to deviſe; having ſurrendered it to the uſe of his will. This is a copyhold

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(*a*) *Ante*, vol. 5. 476. 2 *Boſ.* and *Pul.* 303.

(*b*) *Ante*, vol. 2. 526. 5 *Term Rep. B. R.* 571.

eſtate, but of a perſonal nature. The ſtrong ground is, that the limitations are wholly inapplicable, an argument, upon which *Sheffield* v. *Lord Mulgrave*, *Doe* v. *Buckner* (*a*) and many other caſes turned; admitting, that the eſtate might paſs under circumſtances. Another head of caſes has been treated in the ſame manner; upon the queſtion, whether under the general words "all my eſtate" an eſtate held by the teſtator as a bare truſtee paſſed (*b*). The late Lord Chancellor looked at the limitations; and where the ſubject was real eſtate, hampered with limitations, which could not be ſuppoſed applicable to a truſt eſtate, held, that it could not be included; and that ſeems alſo to be Lord *Alvanley*'s opinion (*c*).

Mr. Mansfield in reply—This teſtator meaning to give every copyhold eſtate he had in any part of the kingdom could not have uſed words more appropriate. The argument, that the limitations are inapplicable, a circumſtance common in diſpoſitions of freehold and leaſehold eſtates, is too ſlight to defeat the general intention, expreſſed in the plaineſt words. What reaſon could he have as to the charitable legacies, but that he knew, they could not be charged on his real eſtate? *Roſe* v. *Bartlet*, *Thompſon* v. *Lawley*, and the other caſes of that claſs, do not apply here. It is very different to decide, that a general deviſe of all lands, with a deſcription applicable to eſtates of inheritance, will not include leaſehold eſtates, and that a deviſe of all and ſingular his copyhold eſtates will not include copyhold eſtates. Land and leaſehold are frequently contradiſtinguiſhed in the weſtern part of the kingdom. When the caſe of *Sheffield* v. *Lord Mulgrave* came back, conſiderable doubt was entertained as to the deciſion of the Court of *King's Bench*; and Lord *Roſslyn* would not act upon it. Certainly there was ſomething very particular in that caſe with regard to the renewal of the leaſe, directed only in a particular event. The deciſion at law went merely upon this; that the particular direction as to the renewal might be what was meant by the words "hereinafter mentioned and deviſed." In

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(*a*) 6 *Term Rep. B. R.* 610.

(*b*) *Ex parte Brettell, ante*, 571. The *Attorney General* v. *Buller, ante*, vol. 5. 339. and the references.

(*c*) The *Duke of Leeds* v. *Munday, ante*, vol. 3. 348. and the note, *ante*, vol. 5. 341. to *The Attorney General* v. *Buller*.

this caſe there is no one circumſtance againſt the plaintiff, except the limitations; and there is nothing to reſtrain the general words. The words cannot be ſatisfied by the copyhold eſtates in other Counties, if any one copyhold in any County is left out; and there are none in *Worceſterſhire*, that paſs by the will.

Lord CHANCELLOR—If I had been aware of the nature of this caſe, I would have taken a mode of having it decided, that would in effect have given me the opinion of a Court of Law. I have been ſtruggling to frame a caſe: but it is infinitely difficult to do that. If I had been aware of that difficulty, I would have deſired the aſſiſtance of ſome of the Judges; and am ſtill diſpoſed to take that method; for this is a caſe of conſiderable difficulty and conſequence; and if it involves the conſideration of *Roſe* v. *Bartlet*, *Thompſon* v. *Lawley*, and the other caſes upon that ſubject, it is peculiarly fit, that it ſhould be argued with that aſſiſtance. My own opinion upon the principles, that ought to regulate the Court with regard to thoſe caſes, I formed with great labour; and came to this concluſion; that *Roſe* v. *Bartlet* afforded a clear, intelligible, rule; by which you might judge; applying a doctrine of law, familiar and eaſily underſtood, as to legal inſtruments. It is impoſſible to deny, that Lord *Hardwicke* in *Chapman* v. *Hart* (*a*) and *Knotsford* v. *Gardiner* (*b*) held, that *Roſe* v. *Bartlet* was ſacred; that it was not to be touched; and he muſt have been informed of *Addis* v. *Clement*, before his immediate predeceſſor: but he held that rule clear doctrine, a land mark in the law. If any fault is to be found in what he ſays, it is a fault on the other ſide; that perhaps according to the note he carries his idea farther than a ſtrict attention to the rule could juſtify.

As to *Lowther* v. *Cavendiſh*, it is difficult to believe, Lord *Northington* ſaid what is reported. He was a great lawyer; and very firm in delivering his opinion; and if he diſſented from *Roſe* v. *Bartlet*, I rather think, he would in a firm and manly way have denied that caſe to be law, rather than have thrown out ſuch an obſervation. With reſpect to *Lane* v. *Lord Stanhope*, when the general rule is underſtood to be according to *Roſe* v. *Bartlet*, and a que-

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(*a*) 1 *Veſ.* 271. (*b*) 2 *Atk.* 450.

a queſtion ariſes as to an exception out of that rule, there will be a difference of opinion upon the intention ariſing from the circumſtances; as thoſe circumſtances operate upon different minds. But there is no great miſchief in that: ſo long as the general rule is acknowledged, and the difference ariſes only from the views of different minds, conſtruing the ſame circumſtances. As to what Lord *Kenyon* ſays (*a*) in that caſe upon *Piſtol* v. *Riccardſon* (*b*), ſuppoſing, that Lord *Mansfield's* opinion would have been different, if *Addis* v. *Clement* had been adverted to, I am not quite ſure of that. In that caſe I ſhould not have followed *Addis* v. *Clement*. Some of the diſtinctions in that caſe appear to me, not only not ſolid, but incapable of being reconciled to legal doctrine. I am alſo of opinion, that, inſtead of ſtruggling by little circumſtances to take caſes out of a general rule, it is more wholeſome to ſtruggle not to let little circumſtances prevent the application of the general rule. There is hardly one of thoſe caſes, in which it is not ſaid, that the general intention was to make the leaſehold eſtate go with the real eſtate as far as by the rules of Law and Equity it can. Such an intention is very familiar in fact (*c*): but no conveyancer would have attempted to execute ſuch intention in the way, from which in any of thoſe caſes that imputed intention has been held a ground for paſſing the leaſehold eſtate. The mode of doing it is plain: either by very ſpecial limitations as to the leaſehold eſtate, as there were in *Pelham* v. *Gregory* (*d*); technical limitations, to prevent it from veſting, and to carry it as far as the rules of Law and Equity will admit; or, if general words are preferred, you ſtate, that it ſhall go as long as the rules of Law and Equity will permit it to be enjoyed with real eſtate: that is, nearly till a Recovery can be ſuffered: *viz.* till the age of twenty-one of the tenant in tail. Then the rule of Law will not let it go farther: whereas the other will go, till a Recovery is ſuffered. In all theſe caſes that intention might have been fruſtrated immediately after the teſtator's death; as where the limitation is to the father for life; with remainder to the ſon in tail; and a ſon had lived a minute: the whole effect would be, that the father would have taken the whole leaſehold eſtate.

(*a*) 6 *Term Rep. B. R.* 353.

(*b*) Stated 2 *P. Will.* 459. in Mr. *Cox's* note to *Addis* v. *Clement*.

(*c*) *The Duke of Newcaſtle* v. *The Counteſs of Lincoln*, *ante*, vol. 3. 387.

(*d*) 5 *Bro. P. C.* 435.

I never could ſee the policy of taking caſes out of a general rule of Law, which all may underſtand, upon the ground of intention, which the teſtator has taken no one of the ordinary means to expreſs. This caſe will not turn upon that. The circumſtance, that the limitations are inapplicable, is very ſtrong for inferring the intention, if the words leave it ambiguous, whether leaſehold eſtates are meant, or not: but if the teſtator has expreſsly ſaid, he meant leaſehold eſtate, however ignorantly, idly, or ineffectually, he has deſcribed the ſubject, it is in vain to reſort to that circumſtance; for you cannot ſtrike out the deſcription. There are frequent inſtances both of deeds and wills, in which leaſehold eſtates are given and ſettled with freehold eſtates; ſometimes even a leaſe for ten years; with all theſe limitations in ſtrict ſettlement, truſtees to preſerve contingent remainders, croſs remainders, powers of leaſing and jointuring; cloathing it with all the uſes and powers, to which freehold eſtates are liable. The anſwer probably would be, that it was not intended: but the misfortune is, that in the caſe of a will it cannot be rectified; and the leaſehold eſtate muſt be held by conſtruction according to the known rules of Law.

Deviſe of all freehold lands would include leaſes for lives; though the limitations are inapplicable.

It is ſtated, and I think ſo, that a deviſe of all freehold lands will include leaſes for lives: notwithſtanding all theſe limitations would be juſt or nearly as inapplicable to that intereſt as to this; for under the Statute (*a*), if there is no ſpecial occupant, that would be diſtributable as perſonal eſtate. It does not become perſonal eſtate, ſtrictly ſpeaking: nor does it become liable to that application till after the death of the party: nor is it by force of any property inherent in the eſtate itſelf, but by force of the Statute, to avoid the inconvenience of general occupancy. In the life of the party it would be conſidered freehold eſtate. That caſe therefore does not neceſſarily govern this; in which the eſtate in one ſenſe was copyhold eſtate in the life of the teſtator, and in another was perſonal eſtate even in his life. It comes nearer the caſe of a man, having freehold eſtates of inheritance, leaſeholds for lives, and leaſeholds for years; and giving his leaſeholds at *A.* and his freeholds at *B.* That ſort of caſe is not very unlike this; for this teſtator had freehold eſtates in fee-ſimple, copyholds of inheritance, and this eſtate, that was copyhold, but alſo in another

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(*a*) 29 *Char.* 2. *c.* 3. 14 *Geo.* 2. *c.* 20.

ſenſe perſonal eſtate; and the queſtion would be much the ſame; whether he meant all his copyhold eſtates, in the moſt extenſive ſenſe, or thoſe, which were his copyhold eſtates, ſtrictly ſpeaking, as contradiſtinguiſhed from this perſonal intereſt in a copyhold eſtate. This teſtator having taken this ſort of property, with an expreſs clauſe, that the truſtee ſurviving was to diſpoſe, when the executors, adminiſtrators, or aſſigns, of the teſtator ſhould require, and having taken a grant of the reverſion for two lives with a ſimilar clauſe, being underſtood in his life to be diſtributable as his perſonal eſtate after his death, and being in common parlance underſtood as perſonal eſtate, the teſtator alſo being ſeiſed of copyhold eſtates deſcendible, and deviſing all and ſingular his freehold and copyhold eſtates, with all the limitations of a ſettlement, it is very difficult to conceive, he meant ſo to diſpoſe of that property. Firſt, it was renewable; and there is no fund for renewal. Secondly, the firſt infant would take in tail male; and if he died immediately, the property would be diſtributable among his next of kin. Such an intention never could with propriety be attributed to the teſtator. There are traces in ſome expreſſions in this will, that authoriſe the opinion, that he meant by theſe general words, "all and ſingular my freehold and copyhold meſ"ſuages, lands," *&c.* exactly the ſame as in other parts of the will he meant by his real eſtate. He charges his real eſtate with his debts, if his perſonal eſtate ſhould not be ſufficient. It would be ſingular to ſuppoſe, he ſhould not underſtand this copyhold eſtate, charged by law with the debts, to be chargeable by law; and that he meant it to be charged by him as his real eſtate. His copyhold eſtates muſt, like all the reſt of his real eſtate, be taken to be ſpecifically deviſed. Then the perſonal eſtate is firſt applicable; and the copyhold eſtate is only to contribute with the other real eſtate. You muſt ſuppoſe, he meant to draw out this intereſt in this copyhold eſtate from the obligation the law impoſed upon it, as a ſubject applicable to debts independent of his will, and to diſtinguiſh it from the reſt of the perſonal eſtate, making it applicable only in the caſe of deficiency of the perſonal eſtate; and even in that caſe not generally liable, but only to a contribution with all the reſt of his freehold and copyhold eſtates. The ſound conſtruction is, that he meant upon the whole to diſtinguiſh between his perſonal and real eſtates; conſidering this copyhold as his perſonal eſtate, rather than as real eſtate,

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eſtate, which he meant to deviſe under theſe words; that it paſſes as perſonal eſtate; and would have paſſed under a general bequeſt of the perſonal eſtate, if not entangled, as it is in this will. He has uſed two deſcriptions, capable of deſcribing this particular eſtate; and then it is a queſtion of intention upon the whole will, which he meant to apply to this particular eſtate; and the beſt conſtruction is, that he meant, the deſcription of perſonal eſtate, which would be a deſcription of it, ſhould apply to it, than that under all the circumſtances he meant the deſcription of "copyhold" ſhould apply to it; as it would without theſe circumſtances.

According to this opinion therefore the bill muſt be diſmiſſed: but, as it involves the conſideration of queſtions of very conſiderable importance, if this opinion ſhould be thought not the right reſult of the authorities, I will rehear the cauſe: but in that caſe I ſhall certainly call for farther aſſiſtance.

No petition of rehearing being preſented, the bill was diſmiſſed.

Feb. 6. 11.

Ex parte LEERS.

Dividends declared upon a bill of exchange, though not received, muſt be deducted from the proof by the indorſee under another Commiſſion of bankruptcy.

POURTALIS and Company, of *London*, drew a bill of exchange, dated the 23d of *July* 1799, on *Cloeſſen Kieckhoefer* and Company of *Hamburgh* for 750*l.*, payable three months after date to the order of *Mendez Pereira*, and *Caſtellain*; which was accepted; and indorſed by *Mendez Pereira*, and *Caſtellain*, to the order of *Pierre Bourſier de Rueſnas*, a merchant at *Hamburgh*, and afterwards indorſed by him to *Leers* and Company.

The bill was proteſted for non-payment. In *January* 1800 a Commiſſion of Bankruptcy under the Great Seal of *Great Britain* iſſued againſt *Mendez Pereira*, and *Caſtellain*. *Cloeſſen*, *Kieckhoefer*, and Company and *Pierre Bourſier de Rueſnas* alſo were made bankrupts. *Leers* and Company cauſed the bill to be claimed againſt both their eſtates according to the due courſe of ſuch proceedings at *Hamburgh*; and a dividend of 6*s.* in the pound was declared of the eſtate of *Cloeſſen*, *Kieckhoefer*, and Company; and a dividend was alſo declared of the eſtate of *Pierre Bourſier de Rueſnas*.

Leers and Company not having received any part of thoſe dividends applied to be admitted to prove under the Commiſſion againſt *Mendez Pereira* and *Caſtellain* for the amount of the bill of 750*l.* and the charges: but the Commiſſioners refuſed to admit the proof for the whole ſum; alleging, that they ought to deduct the amount of the dividends reſerved from the eſtates of *Cloeſſen*, *Kieckhoefer*, and Company, and *Pierre Bourſier de Rueſnas*; upon which the petition was preſented by *Leers* and Company; inſiſting, that not having yet received any part of the ſaid reſerved dividends they are entitled to prove the whole amount of the bill and charges againſt the eſtate of *Mendez Pereira* and *Caſtellain*; and praying accordingly, that they may be admitted to prove the full amount, and receive dividends *pari paſſu* with the other creditors, until they are fully paid the amount of the bill and charges.

This petition was mentioned on ſeveral days: The Lord Chancellor expreſſing conſiderable doubt, whether a man having a bill, by virtue of which he has three debtors, is not entitled to prove the whole againſt each eſtate, until he has received 20*s.* in the pound (*a*).

Mr. *Cooke*, being applied to by the Lord Chancellor as to the practice at *Guildhall*, ſtated, that a dividend declared was conſtantly deducted; obſerving, that in *Brown* v. *Bullen* (*b*) it was decided, that an action for money had and received lies for the amount of the dividend the moment it is declared: and it would be ſingular, if the creditor could arreſt in that action, and yet go before the Commiſſioners, ſwearing, he had received no ſecurity or ſatisfaction whatſoever.

(*a*) See *Ex parte Bloxham*, *ante*, 449. 600.

(*b*) *Doug.* 392.

Mr. Romilly and Mr. Leach in ſupport of the petition put the caſe of a dividend declared immediately; the party at *Hamburgh*, and knowing nothing of it: whether it would be payment in that caſe.

Proof by obligee under a Commiſſion againſt the principal, at the requeſt of the ſurety, ſecuring the obligee by paying the amount of the bond into a banker's.

Lord CHANCELLOR made the order, that the dividends ſhould be deducted according to the practice, as ſtated by Mr. *Cooke*; ſtill expreſſing doubt as to the principle of it; and, in anſwer to the objection from the difficulty put as to the creditor taking the uſual oath, referring to the caſe of principal and ſurety in a bond: the principal being a bankrupt, and the obligee inſiſting on payment from the ſurety is deſired by him to prove under the Commiſſion, and he will pay the amount into a banker's (a).

(a) *Ex parte Atkinſon*, 1 *Cooke's* Bank. Law, 230.

Feb. 20, 22, 23.

JENKINS *v.* HILES.

General rule, that the Court will not decide upon a title without a reference to the Maſter; unleſs unequivocally, and without fraud or ſurpriſe, waived: a plaintiff ſeeking a ſpecific performance of a contract being entitled to the opportunity of making out a better title before the Maſter; and the defendant having a right to farther inquiry, beyond the objections ariſing on the abſtract, upon the principle, that the bill ſeeks relief beyond the law.

By indentures, dated the 5th of *April* 1761, *Edward Cludd* deviſed to *Joſeph Hiles* certain eſtates and premiſes; to hold to *Joſeph Hiles*, his executors, adminiſtrators, and aſſigns, for the term of 99 years, if *Hiles* and his wife and their daughter, or any or either of them, ſhould ſo long live, at the yearly rent of 63*l.* 3*s.* 4*d.*; with a proviſo for re-entry if *Hiles*, his executors, *&c.* ſhould leaſe or aſſign the premiſes or any part without the licence of *Cludd*, his heirs or aſſigns, in writing firſt had; except ſuch diſpoſal as *Joſeph Hiles* ſhould make of the premiſes entire for the benefit of his wife or any child or children without parting the ſame.

By indentures, dated the 4th of *February* 1763, *Joſeph Hiles* in conſideration of 200*l.* paid to him by *Cludd* aſſigned the premiſes to *John Stamer* for the reſidue of the term under the yearly rents, covenants, proviſoes, conditions, and agreements, in the original leaſe, in truſt for *Cludd*, his executors, *&c.* ſubject to redemption.

By indentures, dated the 20th of *January* 1766, in conſideration of 283 *l.* 12 *s.* 3 *d.*, paid by *John Windſor* to *Cludd*, and 216 *l.* 7 *s.* 9 *d.* paid by him to *Hiles*, the premiſes were aſſigned to *Windſor*, his executors, *&c.* for the reſidue of the term, ſubject to the rents, covenants, proviſoes, reſervations, conditions, and agreements, mentioned and compriſed in the original leaſe, ſubject to redemption by *Joſeph Hiles*, his heirs, executors, and adminiſtrators.

By indentures, dated the 25th of *July* 1767, *Joſeph Hiles* in conſideration of 100 *l.* paid to him by *John Hammonds*, aſſigned the premiſes to *Hammonds*, his executors, *&c.* for the reſidue of the term, and alſo during all the other eſtate, term and intereſt, which *Joſeph Hiles*, his executors, *&c.* might have under the ſaid leaſe, ſubject to the rents, proviſoes, covenants, and agreements, contained in the original leaſe; and ſubject to the mortgage veſted in *Windſor*.

By indentures, dated the 20th of *January* 1769, *Windſor* in conſideration of 500 *l.* paid to him by *James Hiles* aſſigned, and *Joſeph Hiles* ratified and confirmed, to *James Hiles* the premiſes for the reſidue of the term, at and under the yearly rents, covenants, proviſoes, conditions, and agreements, contained in the original leaſe, ſubject to redemption by *Joſeph Hiles*, his heirs, executors, and adminiſtrators.

James Hiles having filed a bill of foreclosure againſt *Hammonds*, in *February* 1771 an agreement took place; by which the account of the intereſt was ſettled; and it was declared, that the principal ſhould carry intereſt at 4 *l.* 10 *s.* from *Lady Day* next; and *Hammonds* agreed to make a leaſe to *James Hiles* for ſeven years at a rent of 105 *l.* 10 *s.*; out of which the original rent to *Cludd* was to be paid, and the intereſt of the mortgage to be retained; and the remainder to be paid to *Hammonds*.

In *September* 1775 *Hammonds* died; having by his will given all his perſonal eſtate to his two daughters *Anna*, the wife of

John

John Jenkins, and *Sarah Breach*. *Samuel Breach*, the huſband of the latter, died inteſtate in *January* 1791; and adminiſtration was granted to his widow.

James Hiles having been in poſſeſſion under the agreement of 1771 without paying any rent, except the original rent to *Cludd*, *Jenkins* and *Breach* ſerved him on the 26th of *September* 1786 with notice to quit, and on the 24th of *March* following tendered him 111 *l.* 19 *s.* 6 *d.* for principal and intereſt remaining due on his mortgage, and 25 *l.* for repairs and improvements; which he refuſed; and alſo refuſing to deliver up poſſeſſion, they threatened to file a bill; which led to articles of agreement, dated the 18th of *February* 1790; by which *Jenkins* and *Breach* in conſideration of 300 *l.* agreed to aſſign to *James Hiles* the leaſe of 1761 and the premiſes for the reſidue of the term; and *Hiles* agreed, that he would on the execution of ſuch aſſignment, which it was agreed ſhould be executed before the 3d of *May* next, pay the ſaid 300 *l.* At the ſame time the aſſignment of *July* 1767 of the equity of redemption by *Joſeph Hiles* to *Hammonds*, and the articles of 1790, ſo executed by *Jenkins* and *Breach*, were delivered to *James Hiles*; who was alſo in poſſeſſion of the original leaſe.

The bill was filed by *Jenkins* and his wife and *Sarah Breach* againſt *James Hiles*; praying, that the defendant may be decreed either to accept a proper aſſignment of the equity of redemption, and to pay the conſideration, with intereſt from the time mentioned in the ſaid articles for payment; or that he may account for the rents and profits; and that on payment of what ſhall be found due for principal and intereſt on his mortgage the plaintiffs may be let into a redemption, *&c.*

The defendant by his anſwer ſtated, that he believed, no conſideration whatever was paid by *Hammonds* for the aſſignment from *Joſeph Hiles*; who having married one of the daughters of *Hammonds*, and being impriſoned for debt, and intending to take the benefit of the Lords' Act or ſome other Inſolvent Act, executed the aſſignment to *Hammonds* voluntarily without any conſideration for the ſole purpoſe of defrauding his creditors; and he ſtated declarations of *Hammonds* and *Joſeph Hiles* to that effect.

He farther ſtated, that he was willing to carry into execution the articles of agreement on having a good title made; but the plaintiffs are not capable of making a valid diſpoſition of the equity of redemption without the licence of *Cludd*; and, ſuggeſting the bankruptcy of *Samuel Breach*, ſubmitted, that the plaintiffs ought to have delivered an abſtract of their title, or at leaſt of ſo much as commences with, and is derivative under, the Commiſſion of Bankruptcy againſt *Breach*; that his intereſt is in his aſſignees; and the plaintiffs have not explained, how they claim title under the aſſignees: nor do they take notice of it by the bill.

Upon that anſwer coming in the bill was amended; ſtating the bankruptcy of *Breach*; and that having obtained his certificate he purchaſed from his aſſignees one moiety of the premiſes, ſubject to the mortgage, for 10*l.* 10*s.*; which by deed of aſſignment, dated the 8th of *July* 1784, was aſſigned to him accordingly for the reſidue of the term.

The defendant went into evidence, that the objections were taken by his attorney; and that no abſtract was delivered. The anſwer was replied to: but the plaintiffs did not go into evidence.

Mr. Romilly and Mr. Holliſt for the plaintiffs, in anſwer to the objection to the title for want of a licence from the original leſſor inſiſted, that the condition was determined by the licence given, when the mortgage was made in truſt for him in 1763; according to *Dumper*'s caſe (*a*).

Upon the other objections they contended, that the defendant had dealt with *Hammonds*, as being entitled; and the delivery of the abſtract was unneceſſary: the defendant being in poſſeſſion of all the deeds. They farther urged, that, all the objections appearing upon the pleadings, the Court would decide upon them without a reference to the Maſter.

(*a*) 4 *Co.* 119.

Mr. Lloyd and Mr. Stratford for the defendant—The licence in this caſe might be ſpecial, and under reſtrictions; not like that in *Dumper*'s caſe, which was general, and certainly deſtroys the condition. This tranſaction was nothing more than a licence to mortgage in truſt for the owner of the eſtate. In Equity there may be ſome difference between a licence to alien generally and a licence to enable the leſſee to make a mortgage. A Court of Law does not look at the proviſo for redemption: but this Court only conſiders it a pledge for payment of the money. Such a licence could not in Equity be conſidered a forfeiture of the leaſe; for he cannot be conſidered as parting with his property. The redemption is given to *Hiles*, his heirs, executors, and adminiſtrators, not aſſigns; and the aſſignment is expreſsly ſubject to the covenants, proviſoes, conditions, and agreements, in the original leaſe.

But it is now inſiſted, that the Court in a caſe of this kind can upon the bill and anſwer decide a queſtion of title without a reference to the Maſter. That is perfectly new. The only authorities for ſuch a propoſition are two late caſes, *Roſe* v. *Calland* (*a*) and *Omerod* v. *Hardman* (*b*). No authority is to be met with previous to the former of theſe caſes; and it may reaſonably be doubted, whether thoſe deciſions are correct. The reaſon for having a Report and proceeding by Exceptions is, that the ground, upon which the Court proceeds, may appear upon the Record. This is analogous to the rule at law, that a writ of error cannot be brought upon an interlocutory judgment. It is often ſaid, that the Maſter's Report is the ſame as a final judgment at Law. If this can be done upon one or two objections, why not upon any number, if appearing upon the pleadings? In *Marlow* v. *Smith* (*c*), the title was referred to the Maſter; though the only point was, whether a truſt eſtate paſſed by a general deviſe (*d*). In *Roake* v. *Kidd* (*e*), though mere queſtions of Law were to be decided, Lord *Alvanley* would not decide them without

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(*a*) *Ante*, vol. 5. 186. (*b*) *Ante*, vol. 5. 722. (*c*) 2 *P. Will.* 198.

(*d*) It is now ſettled, that the truſt eſtate does not paſs. See *The Duke of Leeds* v. *Munday*, *ante*, vol. 3. 348. *Ex parte Sergeſon*, *ante*, vol. 4. 147. *The Attorney General* v. *Buller*, *ante*, vol. 5. 339. *Ex parte Brettell*, *ante*, 571.

(*e*) *Ante*, vol. 5. 647.

out a reference to the Maſter. The ſame courſe was taken in *Cooper* v. *Denne* (*a*) and *Abel* v. *Heathcote* (*b*). In the latter there could not have been a more naked queſtion. Nothing could have ſent that to the Maſter but the form of the Court, requiring the title to be ſtated. Upon this ſubject it is very important, that there ſhould be ſome known, general, rule. The deciſion in *Omerod* v. *Hardman* was given in oppoſition to a deliberate opinion of Lord *Redeſdale* and others. A reference is more neceſſary upon facts; where facts may come out before the Maſter. In this caſe every ſuſpicion is thrown upon the title by the conduct of the plaintiffs.

Mr. Romilly in reply—In this caſe certainly there cannot be a decree in the firſt inſtance without conſent; as it does not appear, that there was an aſſignment by the aſſignees of the bankrupt; without which a good title cannot be made. But the inquiry ought to be confined to that point; and is not to be a general reference to inquire, whether a good title can be made.

Upon the point now urged, that there is an invariable rule, no matter what may be the ſtate of the pleadings, that a reference to the Maſter may be inſiſted on, no ſuch rule appears in any of the caſes, that have been referred to. In *Marlow* v. *Smith* the bill was not for a ſpecific performance; and the queſtion as to the title could not come on except upon the Maſter's Report. In *Cooper* v. *Denne*, *Abel* v. *Heathcote*, and *Roake* v. *Kidd*, no queſtion was made, whether the points might not have been decided at the original hearing, if upon the ſtate of the pleadings they could have been decided. There is no deciſion againſt the two laſt caſes. But there is a great difference between the general propoſition, that upon a bill by a vendor the purchaſer ſhall be compelled to take the title ſtated without a reference, and ſuch a caſe as this: the defendant ſubmitting to have the agreement carried into execution; and ſtating the points, upon which he objects. What can be the reaſon of a rule creating great additional expence? What advantage is there in having the opinion of a Maſter upon the very points now before the Court? If the defendant chooſes to ſtate his objections upon the anſwer, the Court may

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(*a*) *Ante*, vol. 1. 565. (*b*) *Ante*, vol. 2. 98. 4 *Bro. C. C.* 278.

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decide upon them. There is great objection to this; for the ground may not appear in this way; as it is not neceſſary, that the Exception ſhould ſtate the point; which in *Abel* v. *Heathcote* was ſaid to be modern practice; and that the uſual way was to take the Exception generally that the Maſter has ſtated, that a good title cannot be made. There is more advantage therefore in having the point clearly ſtated upon the Record.

Upon the firſt objection it is ſaid, there is ſomething peculiar in this caſe; and the aſſignment is not abſolute, but by way of mortgage. Theſe covenants are always held to great ſtrictneſs: *Cruſoe* v. *Bugby* (*a*). *Roe* v. *Galliers* (*b*). A mortgage is an abſolute aſſignment at Law. There is the ſame objection to that; for the only object of the covenant is, that the leſſor ſhall not have a tenant he does not approve of. Upon the objection, that the aſſignment is ſubject to the covenants, conditions, and proviſoes of the original leaſe, there is nothing ſpecial in the aſſignment. Every aſſignment muſt be ſubject to all the covenants; and theſe words being tacitly included have no operation. But if there was any ambiguity, it is removed by the conduct of the leſſor; who has accepted a tenant and received rent under this aſſignment for thirty-three years. It would be impoſſible for him now to bring an ejectment. As to the objection, that the aſſignment to *Hammonds* by *Joſeph Hiles* was fraudulent, it has ſtood unimpeached for thirty-five years; and the defendant himſelf filed a bill of foreclosure againſt *Hammonds*; and afterwards entered into this agreement with him; conſidering him as mortgagor. Under theſe circumſtances they cannot have an inquiry, whether that conſideration was paid upon a deed executed ſo long ago; and then there is nothing to refer as to that.

Lord Chancellor—I feel very great diſinclination to make the decree, which under all the circumſtances I think myſelf required to make. That diſinclination is diminiſhed by the conſideration, that though the decree in form cannot be what I wiſh, it will in ſubſtance and the execution of it not operate otherwiſe than if I could make the decree I wiſh to make. But I am of opinion, I am bound to refer this to the Maſter; to ſee, whether

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(*a*) 3 *Wilſ.* 234. *Seers* v. *Hind*, *ante*, vol. 1. 294.

(*b*) 2 *Term Rep. B. R.* 133.

a good title can be made to the equity of redemption, which is the ſubject of this contract.

It is admitted, that, where a bill is filed for ſpecific performance of a contract for the purchaſe of real eſtate, in ordinary caſes the defendant may have a reference upon the title for aſking for. I always conceived, that was not a rule founded merely in practice, and not in any aſſignable principle; but that it is really founded in principle, and a principle ſomewhat of this nature; that if, inſtead of bringing an action of damages for breach of covenant, the plaintiff comes here for a ſpecific performance, the defendant has a right, not only to have ſuch a title as the plaintiff offers upon the abſtract unauthenticated, but, in conſideration of the relief ſought here beyond the law, to have an aſſurance about the nature of his title, ſuch as he cannot have elſewhere. Therefore the Court never acts upon the fact, that a ſatisfactory abſtract was delivered; unleſs the party has clearly bound himſelf to accept the title upon the abſtract: but, though the abſtract is in the hands of the party, who ſays, he cannot object to it, yet he may inſiſt upon a reference. Why? Becauſe the decree compels the other party to produce all the deeds, papers, *&c.* in his cuſtody or power; from which reaſonable and ſolid objections to the title may be furniſhed; which would never have fallen under the view of the purchaſer, unleſs the Court wrung from the conſcience of the vendor that ſort of information, which a purchaſer could by no other means acquire. Inquiries and examinations alſo may be directed; by which the title may be ſifted in a way, in which it never could upon a mere abſtract, authenticated as the vendor thought proper. The rule therefore is founded upon a right, that gives ſpecifically all the aſſurance, which in the nature of things the party can have from ſifting the conſcience of the party, who ſues him in this Court as to the matter of title. I have never underſtood, that the rule has gone this length; that the defendant, againſt whom a ſpecific performance is ſought, may not by an anſwer unequivocal, to which he was not drawn by ſurpriſe, the propriety of which is not rendered diſputable by any ſubſequent diſcovery, waive the benefit of this principle; and come here, ſaying in effect, he truſts the repreſentation of the plaintiff without the obligation of an oath upon his conſcience; offering in the firſt inſtance to the deciſion of the Court one neat dry point; upon which alone his objection reſts. The rule has not been conſidered ſo abſolute. But ſuch inſtances, if they have occurred in practice, will not ſhake the rule; but forming an exception would confirm the general rule.

On the other hand *Roſe* v. *Calland* and the caſe in the Duchy Court are not caſes of this claſs: the vendor in thoſe caſes coming for a ſpecific performance: the vendee calling for a deciſion; and objecting, if that is his title, and he puts himſelf upon it, and chooſes to abide by that, and admits, that nothing he can do will heal the deficiencies appearing upon the title. I ſhould there alſo be diſpoſed to think, that, if the general rule is, that the vendor is entitled to clear away all difficulties by what he can do between the hearing and the Report, it would be difficult to ſay, there could not be a caſe, in which the plaintiff might not have ſtated himſelf ſo concluſively, that the Court ſhould heſitate in the firſt inſtance to decide. If I am to ſtate a doubt upon the caſe in the Duchy Court, it would be a doubt, whether it could be collected from what was ſtated by the plaintiff, that, if the title was imperfect, it was ſtated concluſively, or, whether, if ſtated concluſively, it was doubtful. Upon that caſe I ſhall only ſay, that paſſages have crept into the Report, which it is very difficult to reconcile with the ordinary practice of this Court and ſome of the doctrine very familiarly applied here. I allude to ſome paſſages as to what truſtees for payment of debts and legacies can do, ſtated with a degree of doubt, which it is not wholeſome ſhould remain as an authority (*a*).

Charge or direction by deed or will for payment of debts generally, followed by ſpecific diſpoſitions: the purchaſer is not bound to ſee to the application.

(*a*) The Lord CHANCELLOR during the argument obſerved upon that caſe, that the Court were miſtaken in ſuppoſing, the purchaſer had any thing to do with the annuity to the lunatic, the legacy of 400 *l.* *&c.* If that was ſo, his Lordſhip ſaid, he ſhould agree with the judgment: but it was long ſettled, that where a man by deed or will charges or orders an eſtate to be ſold for payment of debts generally, and then makes ſpecific diſpoſitions, the purchaſer is not bound to ſee to the application: it is juſt the ſame as if the ſpecific bequeſts were out of the bill. The caſe under conſideration would ſhake that rule. The truſtees had the legal eſtate under the deed; and the truſt was to ſell for payment of debts generally. They were therefore enabled to make a title to the purchaſer; who was not bound to ſee to the payment of the legacy, the annuity, *&c.*

See the authorities collected by Mr. *Fonblanque*, 2 *Treat. Eq.* 148, 149. As to an executor pledging the aſſets as a ſecurity for his own debt, ſee *Hill* v. *Simpſon. Poſt.*

As to *Roſe* v. *Calland*, I conſider it only as a caſe, in which the plaintiff did ſtate himſelf as not being able to ſtate a better title; not as an authority, that, if he had ſaid he could make a better title between the hearing and the Report, the Court would have bound him to what he had ſtated in his bill; and that on account of that ſtatement he had given up the right to a ſpecific performance. It is impoſſible to deny, that upon the old authorities a ſpecific performance might be obtained, if the title could be made good before the Report. The Court would execute the contract then; regard being had to the juſtice due to particular caſes. Where the vendor is plaintiff, if the rule is founded in a principle of conſcience, and requiring all poſſible ſecurity to be given to the purchaſer, the Court will at leaſt take care, that, where it is contended, that the defendant has waived his right to a reference, it ſhall be clear, that there was no ſurpriſe upon him, and that there has been a full and fair repreſentation as to the title on the part of the plaintiff; not merely that repreſentation, which a conſcientious man would make after due diligence, but that, which a conſcientiouſly diligent man would make. But, where from fraud or ſurpriſe on the part of the plaintiff there has been deficient information, the Court will take care, that a defendant ſhall never be ſurpriſed by the effect of a ſubmiſſion made upon want of full information. In the ordinary caſe of purchaſe, if any thing is diſcovered afterwards, the Court acts upon the conſcience of all parties, while it has its finger upon the money; and after any ſubmiſſion; provided the diſcovery is made, before the money is gone out of Court.

In this caſe there is no intention on the part of the plaintiff to ſink any circumſtance as to the title; and I go upon the application of a general principle in a caſe, in which individually out of Court I ſhould think myſelf hardly bound to apply it; alluding to the length of poſſeſſion and other circumſtances. The defendant ſtates certain objections. Suppoſe, the anſwer ſays, thoſe objections being removed, he will take the title: am I to bind him by that? The anſwer intimates the circumſtances of *Breach*'s bankruptcy; and that produces from the plaintiffs a perfectly different repreſentation of their title. Can it be ſaid, that a defendant is bound by a ſubmiſſion, the anſwer ſtating a fact, which alters the title; and makes it neceſſary to amend the bill, and introduce a fact, a fact, which ought, and which muſt, have been in the plaintiff's knowledge; and in that repreſentation laying a ground for conſiderable examination? It is admitted, that the defendant is not bound upon that point. But why is he bound upon the others? Am I to preſume, that thoſe points are right, and that there is no other; and in the caſe of parties, admitting themſelves wrong in a material inſtance? Upon this ground I am compelled with great reluctance to refer this title. I have an opinion upon the objection as to the licence, and as to the tranſaction with *Hammonds*; conſidering the length of time, and from whom the objection comes: but referring the title generally I ſhall ſay no more upon thoſe queſtions. I am not juſtified, conſidering the general rule, in ſaying, there can be no objection to the title of a plaintiff, ſtating in his original bill, that it is free from objections, to which by his amended bill he admits it to be open.

The decree accordingly directed a general reference as to the title; and an inquiry, whether any abſtract was required; and whether any and what application was made by the plaintiffs to the defendant, before the bill was filed; and what was the reſult.

Feb. 24.

ELLISON *v.* ELLISON.

Diſtinction as to volunteers. The aſſiſtance of the Court cannot be had without conſideration to conſtitute a party *ceſtuy que truſt*; as upon a voluntary covenant to transfer ſtock, &c. But if the legal conveyance is actually made, conſtituting the relation of truſtee and *ceſtuy que truſt*, as if the ſtock is actually transferred, &c., though without conſideration, the equitable intereſt will be enforced.

Settlement of leaſehold eſtates not revoked by a ſubſequent aſſignment by the truſtee to the ſettlor, entitled for life, or by the will of the latter: no intention to revoke appearing; and the terms of a power of revocation not being complied with.

By indentures, dated the 1ſt of *July* 1791, reciting a leaſe, dated the 6th of *June* preceding, of collieries at *Hebburn* and *Jarrowwood* in the county of *Durham*, for thirty-one years to *Charles Wren* and others; and that the name of *Wren* was uſed in truſt for *Nathaniel Elliſon* and *Wren* in equal ſhares, it was declared, that *Wren*, his executors and adminiſtrators would ſtand poſſeſſed of the leaſe in truſt as to one moiety for *Elliſon*, his executors, &c.

By another indenture, dated the 18th of *June* 1796, reciting, that *Elliſon* was intereſted in and entitled to one undivided eighth part of certain collieries at *Hebburn* and *Jarrow*, held by two ſeveral leaſes for terms of thirty-one years; and that he was deſirous of ſettling his intereſt, he aſſigned and transferred all his intereſt in the ſaid collieries and all the ſtock, &c, to *Wren*, his executors, adminiſtrators, and aſſigns, in truſt for *Nathaniel Elliſon* and his aſſigns during his life; and after his deceaſe in truſt to manage and carry on the ſame in like manner as *Wren* ſhould carry on his own ſhare; and upon farther truſt out of the profits to pay to *Margaret Clavering* during the remainder of the term, in caſe ſhe ſhould ſo long live, the yearly ſum of 103*l.* 2*s.* 8*d.*; which ſum is thereby mentioned to be ſecured to her by an indenture, dated the 14th of *May* laſt; and ſubject thereto in truſt to pay thereout to *Jane Elliſon*, in caſe ſhe ſhould ſurvive *Nathaniel Elliſon*, during the remainder of the term, during the joint lives of *Jane Elliſon* and *Anne Furye*, the clear yearly ſum of 180*l.*; and after the deceaſe of *Anne Furye* then the yearly ſum of 90*l.* during the remainder of the term, in caſe *Jane Elliſon* ſhould ſo long live; and ſubject, as aforeſaid, upon truſt to pay thereout to each of the children of *Nathaniel Elliſon*, that ſhould be living at his deceaſe, during the remainder of the term, during the joint lives of *Jane Elliſon* and *Anne Furye*, and the life of the ſurvivor, the yearly ſum of 30*l.* a piece, and after the deceaſe of the ſurvivor the yearly ſum of 15*l.*; and upon farther truſt to pay the reſidue of the profits ariſing from the collieries to the eldeſt ſon of *Nathaniel Elliſon*, who ſhould attain the age of twenty-one; and upon the death of *Margaret Clavering* then upon truſt to pay to each of the children of *Nathaniel Elliſon* the farther yearly ſum of 10*l.*; with ſurvivorſhip, in caſe any of the children ſhould die before twenty-one, or marriage of daughters, provided none except the eldeſt ſhould be entitled to a greater annuity than 50*l.*; and upon farther truſt to pay the reſidue to the eldeſt ſon: provided farther, in caſe all the children die before twenty-one or the marriage of daughters, upon truſt to pay the whole to ſuch only child at twenty-one, or marriage of a daughter: provided farther, in caſe the profits to ariſe from the colliery ſhould not be ſufficient to pay all the annuities, the annuitants except *Margaret Clavering* ſhould abate; to be made up, whenever the profits ſhould be ſufficient; and upon farther truſt, in caſe *Wren*, his executors, or adminiſtrators, ſhould think it more beneficial for the family to ſell and diſpoſe of the collieries, upon truſt to ſell and diſpoſe of the ſame for the moſt money, that could reaſonably be got, and to apply the money in the firſt place in payment of all debts due from the colliery in reſpect of the ſhare of *Elliſon*; and ſubject thereto to place out the reſidue on real ſecurities and apply the intereſt in the firſt place in payment of the annuity of 103*l.* 2*s.* 8*d.* to *Margaret Clavering*, then to the annuities of 180*l.* or 90*l.*; then to pay all the children of *Elliſon* during the life of *Margaret Clavering* the yearly ſum of 22*l.* 10*s.*, and to pay the reſidue of the dividends and intereſt to the eldeſt ſon of *Elliſon* in manner aforeſaid; and if the dividends, *&c.* ſhould not be ſufficient for the annuities, the two annuitants except *Margaret Clavering* to abate; and after her death to pay to each of the children of *Nathaniel Elliſon* the farther yearly ſum of 2*l.* 10*s.* for their lives; and after the deceaſe of *Margaret Clavering* and *Jane Elliſon* upon truſt to pay to each of the children of *Nathaniel Elliſon* the ſum of 500*l.*, in caſe the money ariſing from the ſale ſhould be ſufficient; then upon truſt to divide the ſame equally among all the children, ſhare and ſhare alike; and ſubject, as aforeſaid, to pay over the reſidue to the eldeſt ſon on his attaining twenty-one; and it was declared, that the portions of the children ſhould be paid to the ſons at twenty-one, to the daughters at twenty-one or marriage; and in caſe of the death of any before ſuch period to pay that ſhare to the eldeſt ſon at twenty-one; and if only one child ſhould ſurvive, to pay the whole to ſuch one at twenty-one, or marriage, if a daughter; and in caſe all die before twenty-one, *&c.* then the ſaid *Charles Wren*, his executors and adminiſtrators, ſhall ſtand poſſeſſed of the ſaid collieries and the money to ariſe by ſale thereof, ſubject as aforeſaid, in truſt for *Nathaniel Elliſon*, his executors, adminiſtrators, and aſſigns. It was farther declared, that the annuities ſhould be paid half yearly; and that upon any ſuch ſale the receipt of *Wren*, his executors or adminiſtrators ſhould be a ſufficient diſcharge to the purchaſers. Then followed this proviſo.

“ Provided always and it is hereby further declared that it ſhall
“ and may be lawful for the ſaid *Nathaniel Elliſon* by any deed
“ or deeds writing or writings to be by him ſigned ſealed and
“ delivered in the preſence of and atteſted by two or more cre-

"dible witneſſes, to revoke determine and make void all and "every the uſes truſts limitations and powers herein before limited and created of and concerning the ſaid collieries and coal "mines, and by the ſame deed or deeds or by any other deed to "be by him executed in like manner to limit any new or other "uſes of the ſaid collieries and coal mines as he the ſaid *Nathaniel Elliſon* ſhall think fit."

By another indenture dated the 3d of *July* 1797, but not atteſted by two witneſſes, reciting the leaſes of the collieries, and that the name of *Charles Wren* was uſed in truſt for *Nathaniel Elliſon* and himſelf in equal ſhares; and that *Elliſon* had advanced an equal ſhare of the monies ſupplied for carrying on the collieries, amounting to 9,037*l.* 10*s.*, it was witneſſed, that in conſideration of 4,518*l.* 15*s.* *Wren* aſſigned to *Nathaniel Elliſon* one undivided moiety or half part of all the ſaid collieries demiſed to him by the ſaid ſeveral leaſes, with a like ſhare of the ſtock; to have and to hold the ſaid collieries to *Elliſon*, his executors, adminiſtrators, and aſſigns, for the reſidue of the ſaid terms, ſubject to the rents, covenants, and agreements, in the ſaid leaſes; and to have and to hold the ſtock unto *Elliſon*, his executors, adminiſtrators, and aſſigns, to and for his and their own proper uſe for ever; with the uſual covenants from *Wren* as to his title to aſſign, &c., and from *Elliſon* to indemnify *Wren*, his executors, &c.

Nathaniel Elliſon by his will, dated the 22d of *June* 1796, after ſeveral ſpecific and pecuniary legacies, gave all the reſt and reſidue of his perſonal eſtate and effects of what nature or kind ſoever not before diſpoſed of, to his wife and *Wren* and the ſurvivor and the executors and adminiſtrators of ſuch ſurvivor; upon truſt to call in and place the ſame out in the funds or on real ſecurities; and he directed, that all ſums of money, which ſhould come to the hands of his wife and *Wren* or of the executors, &c. of either of them under the ſaid truſts, ſhould be equally divided between all his children, ſons and daughters, born and to be born, ſhare and ſhare alike: the ſhares to become veſted and be payable upon marriage with conſent of their guardians, and not otherwiſe until the age of twenty-one: ſuch part of the intereſt in the mean time as the guardians ſhall think proper to be applied for maintenance: the reſidue to accumulate; with a direction for payment of part of the principal for advancement; and ſurvivorſhip upon the death of any, before the reſpective ſhares ſhould be payable; and in caſe of the death of all under age and unmarried he gave the dividends and intereſt to his wife for life; and upon her death he gave the principal and a ſum of 3,000 *l.*, charged upon her eſtates, to his ſiſter *Margaret Clavering* and his nephew. Then after ſome farther diſpoſitions of ſtock in favour of his children he gave a legacy of twenty guineas to *Wren*; and appointed his wife and *Wren* executors and guardians.

The teſtator died in 1798; leaving his widow and ten children ſurviving; one of whom, *Charles Elliſon*, died in 1799, an infant. *Wren* alſo died in that year. The bill was filed by the teſtator's widow and *Margaret Clavering*; praying, that the truſts of the deed of *June* 1796 may be eſtabliſhed; and that new truſtees may be appointed.

The younger children by their anſwer ſubmitted, whether the truſts of that deed were not varied or revoked by the deed of *July* 1797.

Mr. Romilly and Mr. Bell for the plaintiffs inſiſted, that the ſubſequent deed, not reciting, or taking any notice of, the prior ſettlement, could not revoke it; that it was not the object of the latter deed to revoke the former; and, that it was not atteſted by two witneſſes; as in order to effect a revocation it ought to be.

Mr. Richards for the eldeſt ſon, defendant, claiming alſo under the deed of 1796, declined to argue the caſe.

Mr. Steele and Mr. W. Agar for the other defendants, the younger children—Though the expreſſion in the clauſe of revocation is "deed or writing," a will with two witneſſes would do; according to the caſe (*a*) from *Ireland* cited in *Lord Darlington* v. *Pulteney* (*b*). No intention however can be found in the will to revoke this ſettlement: but the ſubſequent deed is an implied revocation. What uſe could there be in that deed but to give *Elliſon* the abſolute eſtate; which is quite inconſiſtent with the truſts of the

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(*a*) *Earl of Roſcommon* v. *Fowkes*, cited *Cowp.* 268.

(*b*) *Cowp.* 260.

the former deed; which are very ſpecial, and give a large diſcretion? An inſtrument may be revoked by another, though not taking notice of the former, but only making a diſpoſition inconſiſtent with it. *Lord Fauconberge* v. *Fitzgerald* (*a*): *Arnald* v. *Arnald* (*b*); and though the latter of theſe caſes was upon a will, there is no difference upon a voluntary ſettlement. There is no inſtance, in which a voluntary deed, defective, and not effectual at law, has been aided in this Court; and though this is in ſome reſpects in favour of a wife and children, one of the parties claiming under it is a volunteer; and it is oppoſed by nine out of ten children. This deed, like that in *Colman* v. *Sarrel* (*c*), cannot be proceeded upon at law. But, if the truſt was originally well created, yet if the ſubject gets back, and is veſted in the author of the truſt, the objection lies.

Mr. Romilly in reply—Can it be ſtated as a queſtion here, whether a ſettlement for a wife and children can be inforced againſt the repreſentative of the father or the huſband? *Colman* v. *Sarrel* has not the moſt remote application: the parties claiming under the deed being mere ſtrangers, except by a connection illegal and immoral. It is not neceſſary to conſider the caſe of a mere volunteer. Mrs. *Clavering* was a creditor by an annuity ſecured by a prior deed. Suppoſing, *Elliſon* had an intention to revoke this ſettlement, he had preſcribed to himſelf certain forms, the atteſtation of two witneſſes. There is no inſtance of an implied revocation of truſts, which are only to be revoked expreſsly by a particular, certain, form. But there is not the leaſt pretence upon theſe inſtruments, either the deed or the will, of any ſuch intention. The will was executed only four days after the ſettlement; which is not noticed in either inſtrument. It is no more than conſenting, that the truſtee, having the legal intereſt, ſhall aſſign to another perſon; and taking it himſelf. Notwithſtanding the length the Court have gone upon wills (*d*), this would not be a revocation even of a will; merely taking the legal intereſt having diſpoſed of the equitable. The intention, that theſe truſts ſhould not prevail, would have been expreſsly declared. As far as *Wren*

(*a*) 3 *Bro. P. C.* 543.

(*b*) 1 *Bro. C. C.* 401.

(*c*) *Ante*, vol. 1. 50. 3 *Bro. C. C.* 12.

(*d*) See *Harmond* v. *Oglander*, *ante*, 199. and the references 201, note (*a*).

was a truſtee the deed is revoked: but it was the act of *Wren*, *Elliſon* being paſſive.

Lord Chancellor—I had no doubt, that from the moment of executing the firſt deed, ſuppoſing it not to have been for a wife and children, but for pure volunteers, thoſe volunteers might have filed a bill in equity on the ground of their intereſts in that inſtrument; making the truſtees and the author of the deed parties. I take the diſtinction to be, that if you want the aſſiſtance of the Court to conſtitute you *ceſtuy que truſt*, and the inſtrument is voluntary, you ſhall not have that aſſiſtance for the purpoſe of conſtituting you *ceſtuy que truſt*; as upon a covenant to transfer ſtock, &c., if it reſts in covenant, and is purely voluntary, this Court will not execute that voluntary covenant: but if the party has completely transferred ſtock, &c. though it is voluntary, yet the legal conveyance being effectually made, the equitable intereſt will be inforced by this Court. That diſtinction was clearly taken in *Colman* v. *Sarrel*, independent of the vicious conſideration. I ſtated the objection, that the deed was voluntary; and the Lord Chancellor went with me ſo far as to conſider it a good objection to executing what remained in covenant. But if the actual transfer is made, that conſtitutes the relation between truſtee and *ceſtuy que truſt*, though voluntary, and without good or meritorious conſideration; and it is clear in that caſe, that if the ſtock had been actually transferred, unleſs the tranſaction was affected by the turpitude of the conſideration, the Court would have executed it againſt the truſtee and the author of the truſt.

In this caſe therefore the perſon claiming under the ſettlement might maintain a ſuit, notwithſtanding any objection made to it, as being voluntary; if that could apply to the caſe of a wife and children: conſidering alſo, that Mrs. *Clavering* was an annuitant, and not a mere volunteer. But it was put for the defendants thus; that though the inſtrument would have been executed originally, if the ſubject got back by accident into the author of the truſt, and was veſted in him, then the objection will lie in the ſame manner, as if the inſtrument was voluntary. I doubt that for many reaſons; the truſt being once well created; and whether it would apply at all, where the truſt was originally well created; and did not reſt merely in engagement to create it. Suppoſe, *Wren* had died; and had made *Elliſon* his executor; it would be extraordinary to hold, that, though an execution would be decreed againſt him as executor, yet, happening to be alſo author of the truſt, therefore an end was to be put to the intereſt of the *ceſtuy que truſt.* But it does not reſt there; for *Elliſon* cloaths the legal eſtate remaining in *Wren* with the equitable intereſts declared by the firſt deed; making him therefore a truſtee for *Elliſon* himſelf firſt, and after his death for ſeveral other perſons; and he has ſaid, he puts that reſtraint upon his own power; not only, that he ſhall not have a power of revocation, whenever he changes his intention, but, that he ſhall not execute that power, nor be ſuppoſed to have that change of intention, unleſs manifeſted by an inſtrument executed with certain given ceremonies. My opinion is, that, if there is nothing more in this tranſaction than taking out of *Wren* the eſtate cloathed with a truſt for others, with preſent intereſts, though future in enjoyment, and that was done by an inſtrument with no witneſs, or only one witneſs, it is hardly poſſible to contend, that ſuch an inſtrument would be a revocation according to the intention of the party, the evidence of whoſe intention is made ſubject to reſtrictions, that are not complied with. The only difficulty is, that the declaration of the truſts in the firſt inſtrument could not be executed, the ſecond inſtrument being allowed to have effect. It is ſaid, a power was placed in *Wren*, his executors and adminiſtrators, not his aſſigns, if in ſound diſcretion thought fit, to ſell, and to give a larger intereſt to the younger children than they otherwiſe would take. If *Wren* had not after the reaſſignment that diſcretion ſtill veſted in him, I think, it would not be in the executors of *Elliſon*, and it could not be exerciſed by the Court; though in general caſes truſts will not fail by the failure of the truſtee (*a*). But though the effect would be to deſtroy the power of *Wren*, which I ſtrongly doubt, attending to the requiſition of two witneſſes, I do not know, that it would deſtroy the other intereſts. I think therefore, upon the whole this truſt does remain notwithſtanding this reaſſignment of the legal eſtate to *Elliſon*. I do not think, conſiſtently with the intention expreſſed

In general caſes truſts will not fail by the failure of the truſtee.

(*a*) *Brown* v. *Higgs*, *ante*, vol. 4. 708. vol. 5. 495. depending upon appeal before the Lord Chancellor, 1802.

preſſed in the firſt inſtrument, and the neceſſity impoſed upon himſelf of declaring a different intention under certain reſtrictions, that if a different intention appeared clearly upon the face of the inſtrument, the latter would have controlled the former. But I do not think, his acts do manifeſt a different intention. Suppoſing one witneſs ſufficient, the ſecond deed does not ſufficiently manifeſt an intention to revoke all the benefits given by the firſt deed to the children; and it is not inconſiſtent, that he might intend to revoke ſome and not all.

As to the will, it is impoſſible to maintain, that the will is a writing within the meaning of the power: conſidering, how the ſubject is deſcribed. The word "reſidue" there means that eſtate, of which he had the power of diſpoſing, not engaged by contracts, declarations of truſts, *&c.* It was neceſſary for him to deſcribe the ſubject in ſuch a way, that there could be no doubt, he meant to embrace that property.

Upon the whole therefore this relief muſt be granted; though I agree, that, if it reſted in covenant, the perſonal repreſentative might have put them to their legal remedies, he cannot, where the character of truſt attached upon the eſtate, while in *Wren*; which character of truſt therefore ſhould adhere to the eſtate in *Elliſon*; unleſs a contrary intention was declared; and the circumſtance of one witneſs only, when the power reſerved required two witneſſes, is alſo a circumſtance of evidence, that he had not the intention of deſtroying thoſe truſts, which had attached; and were then veſted in the perſon of *Wren*.

O'CONNOR *v.* COOK.

Feb. 24, 25.

Iſſue directed on a modus for certain lands, amounting to 1 *s. per* acre for all tithes; notwithſtanding the apparent rankneſs.

THE bill was filed by the leſſee under a leaſe for twenty years granted by Trinity College *Cambridge*, of all the tithes both great and ſmall of the hamlet or diſtrict of *Streetfields*, in the pariſh of *Monkſkirby*, againſt an occupier of the lands for an account of the tithes of milk and agiſtment ſubtracted ſince *Michaelmas* 1797.

The defendant by his anſwer ſet up a modus of 20 *l.* a year, payable half yearly, for the lands called *Streetfields* in lieu and ſatisfaction of all tithes; and ſuggeſted, that ſuch modus had been payable long before time of memory, and does not exceed the value of the tithes, for which it hath been payable; which he repreſented to be about 50 *l.* a year.

The effect of the depoſitions was, that *Streetfields* was one entire farm of near 400 acres. Within the rectory are *Ceſterſover* and ſeveral other hamlets. *Streetfields* in its preſent ſtate of cultivation is worth 30 *s.* an acre; and if in tillage would be worth 40 *s.* The yearly value of the great and ſmall tithes in the preſent ſtate of cultivation is from 3 *s.* to 5 *s.* an acre (according to the different witneſſes); and if in tillage, would be 15 *s.*, computed from the preſent high price of every article and the preſent high cultivation of the land. The ſum of 20 *l.* was immemorially paid as a modus or rate-tithe in lieu and ſatisfaction of all tithes; which modus or rate-tithe was alſo ſupported by general reputation.

The other evidence conſiſted of Extents and Inquiſitions *poſt mortem*: an Extent in the third year of *Richard* 2. 1380 of the alien priory of *Monkſkirby*, in which the jury found 384 acres in *Monkſkirby*; of which 192 were arable, worth 3 *d.* an acre, and 192 uncultivated, worth 1 *d.* an acre *per annum*; total value 60 *s.*; and *decimæ gabarum* in the whole hamlet of *Monkſkirby* were worth *per annum* 60 *s.*; alſo, that *Theſterwaver* was parcel of the priory; and there was there of rent 9 *s.*; and that *decimæ gabarum* there were eight marks, 5 *l.* 6 *s.* 8 *d.* The tithes of wool and lamb belonging to the priory in all the twenty hamlets were worth *per annum* 27*l.*; and the other ſmall tithes, mortuaries, and oblations, ten marks; 6*l.* 13*s.* 4*d.*

Upon an Inquiſition *poſt mortem*, 19 *Ed.* 4. A. D. 1480, it was found, that the manor of *Theſtrewaver* with the appurtenances was of the annual value of 20*l.* beyond repairs; and by another in 1546, the 39th of *Hen.* 8. it was found, that *Theſtrewaver* and *Coxford* with the appurtenances and twenty meſſuages compriſed 500 acres; 200 meadow, and 300 paſture; and the ſaid manor and all the ſaid lands were of the annual value of 60*l.* beyond repairs (*a*).

The Solicitor General and Mr. Bell for the plaintiff—The modus ſet up, a ſhilling an acre, is too rank. *Troutbeck* v. *Lawſon* (*b*). *Startup* v. *Doddridge* (*c*). Where the rankneſs is ſo plain, the Court will not ſend it to a jury: otherwiſe it muſt be carried to this extent; that the Court can in no caſe decide without an iſſue. *Moore* v. *Beckford* (*d*). *Ekin* v. *Pigot* (*e*). From Acts of Parliament and many other things, of which the Court can take notice judicially, they can judge of the rankneſs; and, where it moſt clearly appears, they may determine upon it. The Statute of *Edw.* 3. and others fix the average price of the quarter of wheat at 6*s.* 8*d.* That was in the fourteenth century. But carrying it back 300 years farther, it will be found, that the quarter of wheat was at 2*s.* only; which would make this modus much more than the value of the land. Whether theſe tithes were formerly payable upon arable land, or not, depends upon the meaning of the word "*gabarum* (*f*)," occurring in this Extent; whether it includes every thing bound up *in faſces*, ſheafs or bundles; as corn and hay.

Mr. Romilly and Mr. Martin for the defendant—There muſt be an iſſue. From the length of time this muſt be preſumed an immemorial payment; unleſs it contains ſomething in itſelf

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(*a*) The Lord Chancellor obſerved, that the inſtruments made the value of the tithes unaccountably large in proportion to the value of the land.

(*b*) 1 *Wood*'s Exch. 223.

(*c*) *Salk.* 657. 2 *Lord Raym.* 1158.

(*d*) Cited in *Pyke* v. *Dowling*, 2 *Black.* 1257. 3 *Gwill.* Tith. 1166.

(*e*) 3 *Atk.* 298.

(*f*) For the meaning of the word "garba" ſee *Sims* v. *Bennet*, 3 *Gwill.* Tith. 874.

deſtructive of itſelf. This is a queſtion of fact certainly: but notwithſtanding that, if it is ſo clear, that the Court cannot have the leaſt doubt, an iſſue will not be directed. But by refuſing an iſſue in ſuch a caſe as this numerous deciſions will be overturned. The conſideration of the rankneſs of a modus is very different, when it is applied to a parochial modus for any particular article, even throughout a pariſh, and, when it is payable for any particular diſtrict. It is very eaſy to ſee the price of any particular article at the time of memory, the expedition of *Richard* 1. to the *Holy Land.* But it is very different as to land; for one acre of land is not of the ſame value as another, though ſeparated only by a hedge. It is extremely difficult to aſcertain the value of land at any particular time; not only of particular land, but of land throughout the kingdom. That proceeds only upon conjecture as to the value of corn at particular times. There may be a variety of circumſtances, that may have depreciated the value of land. The evidence, that has been read, becauſe no objection was taken, does not ſhew, that *Streetfields* is within the hamlet of *Ceſterſover;* of which there is no evidence. The bill ſtates *Streetfields* as a diſtinct hamlet: but no evidence of that being found, the plaintiff now endeavours to have it conſidered as part of the other; in which he fails. But taking it ſo, and admitting 20*l.* to have been three times the value in the time of *Henry* 6. or *Edward* 4. that is not concluſive. The depretiation in thoſe times of civil commotion does not determine the value at another time. At this time there has not been an enemy in the country for a century and a half. The argument from the preſent rent, to get at the value of the tithe, is very fallacious. It is never aſſeſſed at that value. The value of the land is a very complicated queſtion of fact; not like the queſtion upon a ſingle article. The preſent rule ſeems to be to ſend this ſort of modus to an iſſue; which only revives the former practice. In *Sanſom* v. *Shaw* (*a*) this doctrine of a rank modus was conſidered a ſort of innovation. That it is a queſtion of fact appears from the certificate in *Pyke* v. *Dowling* (*b*). In many other caſes, upon ſmaller or greater payments, the Court has conſidered ſome of them good, and ſome fit for a jury. *Bedford* v. *Sambell* (*c*). *Ekins* v. *Dormer* (*d*). In *Hardcaſtle* v. *Slater* (*e*) the objection of value was conſiderably greater

(*a*) 2 *Gwill.* Tith. 806.

(*b*) 2 *Black.* 1257. 3 *Gwill.* Tith. 1166.

(*c*) 3 *Gwill.* Tith. 1058.

(*d*) 2 *Gwill.* Tith. 800.

(*e*) *Amb.* 41.

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than in this inſtance. In a late caſe in the Court of Exchequer, *Fermor* v. *Lorraine*, evidence of the value of the Rectory very antient was not conſidered ſufficient to prevent it from going to a Jury. The argument for the plaintiff proves too much; applying to all the caſes, in which iſſues have been directed upon a modus of 1*s.* an acre. The Inquiſitions *poſt mortem*, it is well known, are very inaccurate. Favour is ſhewn to the family; and the eſtate is taken at a nominal value. But this is not evidence applying to the land in queſtion; and it is not competent to prove the value of other land, though contiguous. How can the defendant meet the evidence? How can he croſs-examine? The defendant has a right to aſſume, that at the time of the compoſition it was for the moſt valuable tithe, corn and grain. He may go farther: he may aſſume, that the compoſition might from the piety of the perſon be higher, and intended to be beneficial, with a view to the future increaſe as well as the preſent value of the tithes (*a*). In *Chapman* v. *Smith* (*b*) the argument now uſed would have applied; and would have been ſufficient to prove it 1,500*l.* a year. All the arguments applicable to this caſe were uſed in *Graſcomb* v. *Jefferies*, cited by Lord *Hardwicke* (*c*). Nothing is produced in this caſe, but that the tithes are 50*l.* a year; and therefore, it is contended, this modus is too large. In *Ekin* v. *Pigot* there is a circumſtance diſtinguiſhing it entirely; and that caſe certainly was not followed by the Court of Exchequer in *Fermor* v. *Lorraine*. The modus appeared to have been 30*l.* a year. Afterwards an agreement took place to give the clergyman a piece of land, of 6*l.* a year: and therefore the modus ſhould be 24*l.* a year. Pope *Nicholas*'s taxation ſhewed, the whole value of the Living was not more than ——. But the acknowledged inaccuracy of that taxation was what the Court of Exchequer went upon. *Twells* v. *Welby* (*d*) was much ſtronger; for the modus of a ſhilling *per* acre for all tithes was only, when the land was uſed for meadow and paſture; which is generally the leaſt productive to the rector. The deciſion undoubtedly proceeded principally upon the circumſtance, that the Jury had not found the fact, as they ought: but ſtill it proves, that an iſſue was directed upon a much higher modus. *Aſhby* v. *Power* (*e*) applies to the repre-

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(*a*) See the caſe of an incloſure put by Lord *Hardwicke*, 2 *Veſ.* 516.

(*b*) 2 *Veſ.* 506.

(*c*) 2 *Veſ.* 515.

(*d*) 3 *Gwill.* Tith. 1192.

(*e*) 3 *Gwill.* Tith. 1238.

ſentation attempted of this caſe. If they had ſhewn, what the value of the land and the living formerly was, yet, being only matter of inference, as is ſaid in that caſe, it ought to be ſent to a jury. The moduſes in that caſe were higher or equal to this. Few were leſs than 1*s.*: many higher. In *Biſhop* v. *Chicheſter* (*a*) the modus of 2*s.* 6*d.* for every acre of corn and grain was enormous. It does not appear, that any iſſue was directed: but it was objected to as being rank; and the expreſſion is, that ſo the Lord Chancellor inclined to think. According to the calculation now made the value muſt have been 5000*l.* a year. I believe, an account of tithes was decreed as to that: but the Lord Chancellor did not form a deciſive opinion upon it. *Edge* v. *Oglander* (*b*) is certainly a very ſtrong caſe; but has been often cited. In *Atkyns* v. *Lord Willoughby de Broke* (*c*) the Court was diſpoſed to decide againſt the rector, if he had not inſiſted upon an iſſue. The Chief Baron there made the diſtinction as to a farm modus and one for a particular ſpecies of produce. But there is a much ſtronger diſtinction between a parochial modus and one for any particular diſtrict of land.

As to the receipts for the rate-tithe, that expreſſion is often uſed; though it is not clear, what it means: but it is never applied to a temporary, varying, compoſition; and is always underſtood to be ſome antient payment; the origin of which is not known. It is in ſome receipts called a rate-tithe; in others a modus; and it cannot be inferred, that it is not a modus, becauſe the clergyman chooſes to call it a rate-tithe. Lord *Hardwicke* ſays (*d*), the Rector does not often chooſe to give the receipt *quâ* modus; that he may not injure his ſucceſſor; and the occupier muſt take ſuch receipt as the parſon thinks fit to give him; but Lord *Hardwicke* alſo ſays, that antiently theſe payments were not called by the term "modus;" *Richards* v. *Evans* (*e*). It is not neceſſary even in pleading to call it a modus: the only queſtion being, whether there has been an immemorial and unvaried payment; ſo that the Court may preſume a cuſtom; which probably was the old word; "modus" being a modern term in

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(*a*) 2 *Bro. C. C.* 261. more full, 4 *Gwill.* Tith. 1316.

(*b*) Cited, *Bunb.* 301.

(*c*) 2 *Anſtr.* 397. 4 *Gwill.* Tith. 1412.

(*d*) 2 *Veſ.* 512.

(*e*) 2 *Gwill.* Tith. 802. 1. *Veſ.* 39.

the law. This payment is carried farther back in evidence than antient payments generally are, *viz.* above a century. The queſtion now is only, whether this is ſo clear, that the Court will determine it without an iſſue.

The Solicitor General in reply—The Court is to be ſatisfied, whether there is a reaſonable doubt upon the exiſtence of this modus. If your Lordſhip has no doubt upon the caſe, as it ſtands, that this payment cannot have had its origin ſo far back as to meet the legal idea of an immemorial payment, not, as contended, beyond the legal time of memory, your Lordſhip will not be diſpoſed, according to Lord *Kenyon*'s expreſſion (*a*), to ſend it to the prejudices, not the judgment, of a Jury. Your Lordſhip may form a judgment as well as a Jury. Rankneſs is a queſtion of fact, I admit. There may be circumſtances to make the Court doubt, even where the payment is larger. Theſe caſes depend upon their own circumſtances. In *Chapman* v. *Smith*, for inſtance, a great part of the argument goes upon the circumſtance, that the property was ſituated in *Romney Marſh*, a great and impervious diſtrict. *Ekin* v. *Pigot* eſtabliſhes, that, if the Court is ſatisfied by the evidence, that there is no ground for doubt as to the immemorial payment, the Court will not ſend it to a Jury. I admit, in later times the Court has been more diſpoſed to do that. In ſome of the caſes however a very conſiderable prejudice appears in great men on the ſubject of tithes. In *Twells* v. *Welby* the ground does not appear; nor, whether the Court was well informed at firſt; and the indorſement of the Judge was made upon the conception, that this was a queſtion of law. Upon the ſubſequent trial the verdict was for the defendants, the Rectors. In *Biſhop* v. *Chicheſter* an iſſue was not directed; and in *Edge* v. *Oglander* the fact is not, that the value of the lands was only 80 *l.*, but the rent; by which the tithe was to be meaſured. *Aſhby* v. *Power* is one of the ſtrongeſt caſes. The whole queſtion really turns upon the effect of this evidence on the Court as to the poſſibility of this having been an immemorial payment. By the evidence this hamlet of *Streetfields* appears to be in *Ceſterſover*; but at all events is contiguous to it. No preciſe rule has been laid down, in what caſes an iſſue is to be granted.

(*a*) 3 *Gwill.* Tith. 1239.

Lord Chancellor—The queſtion is undoubtedly a queſtion of fact. Tithes of agiſtment and milk are the tithes the land yields at preſent. The account is of courſe; unleſs ſomething is ſet up by the defendant to ſhew, the demand has been otherwiſe ſatisfied, or that he is ready to ſatisfy it in the only way, in which a rector is entitled to have it ſatisfied. The defence is a payment from time immemorial, in a ſtrict ſenſe. There is no doubt, that according to the conſtitution of this Court it may take to itſelf the deciſion of every fact put in iſſue upon the Record; and, with great deference to Lord Chief Juſtice *Willes*, I have not much doubt, that this queſtion was known in Courts of Equity long before Serjeant *Belfield*'s time (*a*). It is pretty clear, that Courts of Equity in ancient times were more in the habit of taking to themſelves the deciſion of queſtions of fact than they have thought wiſe and diſcreet in later times. As to the immemorial payment, if any reaſonable doubt has been raiſed upon it in the evidence, it has been of late thought wiſe and diſcreet to ſend the queſtion of fact to a Jury. All the Judges have demonſtrated their opinion in favour of that practice, where any reaſonable doubt is raiſed upon the fact; and I cannot ſuppoſe, there is any prejudice in a tribunal appointed according to the conſtitution of the country to try the fact. In the diſcuſſion of this, as a queſtion of fact, it is too dangerous to examine the effect of evidence, the inferences from which have been ſo long ſtated to be queſtionable, with the ſame freedom as perhaps I might have done within the laſt twenty years.

Upon the queſtion of fact, whether there has been this immemorial payment, the magnitude of the payment is but evidence of the improbability, that it was immemorially paid; upon the inference, that the land-holder would not ſo long ago have come into ſuch an agreement, to pay a compoſition ſo vaſtly above the value. There is great weight in that. On the other hand a great deal of obſervation has been fairly applied to that. We hear in this country harſh obſervations upon this property; which upon examination will, I believe, be found to be leſs paid for than property of any other ſpecies. But in this caſe for many years back, during which in all probability the payment was not half the va-

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(*a*) See *Sanſom* v. *Shaw*, 2 *Gwill.* Tith. 806.

Rankneſs of a modus is only evidence; not an objection in point of Law.

Diſtinction as to rankneſs between a modus for tithe of particular things and a farm modus.

lue of the tithe, 20 *l.* *per annum* was paid for all tithe; when the value of the agiſtment alone was 50 *l.*: ſo that the queſtion cannot always be determined by the ſingle fact of the relative value of the tithe and the payment in lieu of it. The rankneſs being but evidence as to the immemoriality of the payment forms no objection in point of Law to the modus. If you can infer, that it has exiſted, the inequality of the payment forms no objection to it. Therefore in the caſe in *Blackſtone* the Judges certified, that 2 *s.* 6 *d.* was not an illegal payment for a lamb. As to the tithe of particular things, it is obſerved in all theſe caſes (*a*), that the inference from the magnitude of the payment is much ſtronger againſt the fact, that it is immemorial, than in an agreement to pay ſo much an acre, and *a fortiori* for a particular farm; for it is perfectly eaſy in almoſt any period of our hiſtory to aſcertain, what a lamb was worth; and therefore to conjecture, upon what in any place parties would agree. But what is the value of land in a particular pariſh, and what therefore it is proper to give *per* acre, is a very complicated queſtion. The owner might have been in poſſeſſion of land of very different values; and might commute upon the whole; though, if not an average commutation, it would be a very improvident commutation for a diſtinct part. The ownerſhip might have been ſevered; and then it would be very raſh to conclude againſt a modus, admitted to be too great for any particular part; when the very foundation is, that he thereby got the liberty of compenſating for the tithes in the other lands. So upon a farm modus: I cannot weigh the propriety of it. but I cannot forget, that great Judges have ſaid in Equity, and put it to Juries, that there may be a convenience in having a farm modus; which may induce an individual to give more in that way than he would as a modus for particular titheable produce, or, *per* acre of arable land, and not including hay, *&c.*; and they have ſtated, that piety might induce them to give rather more than leſs than the value to the clergyman.

With regard to the caſes, I never could perſuade myſelf, that 1 *s.* *per* acre upon the principle of rankneſs was not in all probability a monſtrous payment; and, that the payments ſent to be tried at Law were not monſtrous. But ſtill the Judges have

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(*a*) *Richards* v. *Evans*, 1 *Veſ.* 39.

thought, even ſuch payments ought to go to trial; and verdicts, under which in many caſes even more than 1 *s.* an acre has been claimed, have been confirmed. What is this more than 1 *s.* an acre for all tithes of this farm, in whatever form cultivated or occupied; not for agiſtment, milk, lamb, or any other particular tithe. It is ſaid in the argument, this land has formerly been arable. There is very little evidence upon that. I cannot conclude, that it was not; and there is no evidence authoriſing me to ſay, this modus may not be ſhewn by ſome evidence to be as reaſonable a commutation for tithes, even put ſo diſtributively, and not as a farm modus, as in ſome of thoſe caſes, where 1 *s.* an acre has been given even for tithe of hay alone. The caſes certainly are very ſtrong. But when I find iſſues directed in caſes full as ſtrong, and Judges acting upon them afterwards, it would be too bold in me to refuſe the defendant an opportunity of ſubmitting to a Jury queſtions not more improbable than occurred in thoſe caſes; which in the reſult were ſupported by evidence; and were thought to be ſatisfactorily ſupported by the Courts, who ſent thoſe queſtions. Upon this ſubject I diſtruſt myſelf, when I obſerve the comparative value of the tithes; and am ſtruck with the large value of the tithes, compared with the eſtimated value of the land at that day. In this caſe it is enough for me, that I cannot unravel the difficulty, ſo as to ſatisfy myſelf, it was not a great deal more than a tenth of the value of the land. The caſe tried by Mr. Juſtice *Buller* ſeems very ſtrong. It was ſent to be tried under circumſtances ſufficient to make them pauſe. One circumſtance was very ſtrong, as to the value of the whole rectory at the time. No Judge felt more than Mr. Juſtice *Buller* the extent, to which he thought the Law authoriſed Juries to preſume facts. I remember a caſe of preſumption upon the advowſon of *Cheſter le Street*. The manor was granted to the *Milbank* family with an expreſs exemption of the advowſon. They had preſented in one or two inſtances; and the Jury was directed by Lord *Mansfield* to preſume, that the Crown had made a grant; which grant was not produceable; and Mr. Juſtice *Buller* held that direction of Lord *Mansfield* perfectly right. Lord Chief Juſtice *Eyre* was no friend to that doctrine of preſumption; and yet, hoſtile as he was to ſtrong preſumptions, he ſent that caſe back to be tried upon the preſumption, whether 1 *s.* an acre was a good modus upon land, proved worth 16 *s.* an acre, and four

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years before worth 13*s.* an acre. Attending to Mr. *Bell*'s calculation upon the naked queſtion, can it be doubted, looking back to the time of *Richard* 1. whether it was a fair commutation. No one could heſitate upon it: but ſtill the Court of Exchequer ſaid, it was a queſtion of fact: and they ſent it back to be tried; and the concluſion was perfectly right. It might have been ſaid, as Lord *Kenyon* ſaid, will you ſend it to the prejudices of a Jury, not to their judgment? I cannot talk about that. I ſend it to their judgment; and aſk them, what they think upon their conſcience, directed by their oath.

I am not at liberty therefore, after what has paſſed in former caſes, and whatever may be my perſuaſion as to the truth of this caſe, to ſay, this muſt not be tried. In *Fermor* v. *Lorraine* I never had the leaſt doubt, that the modus was too rank: but the Court ſent it to an iſſue.

An iſſue was directed, which was tried at the aſſizes for the County of *Warwick;* and a verdict was found for the plaintiff in the iſſue, the defendant in equity, eſtabliſhing the modus. On the 29th of *November* a motion was made for a new trial, on the grounds of miſdirection of the Judge, and new evidence ſince diſcovered. The former ground referred principally to the obſervations of the Judge on Pope *Nicholas*'s ſurvey, as entitled to little weight; that in the miniſters' accounts in the time of *Hen.* 8. *Streetfields* was not mentioned; that it did not appear to be part of *Ceſterſover;* and it might be preſumed, that there was another bailiff and another miniſter's account as to *Streetfields*. The new evidence was a deed of partition, in conſequence of which a fine was levied, expreſsly compriſing *Streetfields* as part of *Ceſterſover*.

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In enforcing contracts upon the principle of compenſation for a variance from the deſcription the Court has gone ſo far, to the extent even of wholly defeating the object of the purchaſer, that, where the principal ſubject of the contract was all the corn and hay tithes of a pariſh, and of the hay tithe half was allotted to the Vicar, and the other half commuted for a cuſtomary payment, the nature of that payment, the extent of meadow, and the poſſible converſion from arable, not diſtinctly appearing, the injunction was continued after anſwer.

An injunction having been obtained, reſtraining the defendant from proceeding at law to recover his depoſit, the uſual order was made for diſſolving the injunction, unleſs cauſe, upon the anſwer coming in; by which the following circumſtances appeared.

In *Auguſt* the defendant purchaſed from the plaintiff by private contract an eſtate, conſiſting of ſome farms, and the tithes of the pariſh of *Biſhop's Lincomb* in *Devonſhire*, for the ſum 11,000 *l.* the purchaſe to be completed on the 25th of *December.* The deſcription in the particular as to the tithes was this: "Alſo the "valuable corn and hay tithes of the whole pariſh of *Biſhop's* "*Lincomb.*" An abſtract was ſoon afterwards delivered; and a rental: containing the general deſcription of the garb (*a*), otherwiſe the tithe, of hay and corn: the latter expreſſing nothing relative to tithe of hay; but containing theſe entries:

"Cuſtom pay about 2 *l.*"
"Farms out of tillage this year and not in compoſition 5."
"Eſtates occaſionally in tillage but not in compoſition 20."

In *September* the defendant went into *Devonſhire* to ſee the eſtate; and employed a ſurveyor to look over it. Upon the 14th of *December* he wrote to the plaintiff, refuſing to complete his purchaſe; and calling for his depoſit.

The corn tithes aroſe from about 8,000 acres; and were paid by annual compoſition. The tithe of hay was from ſo much of about 2,000 additional acres, as was meadow (how much did not appear): one half of the tithe of hay contained in the allotment belonging to the Vicar: the other half commuted for by a payment of 2 *l. per annum;* the nature of which did not appear: the converſations upon the ſubject not carrying it farther than belief, that it was a modus. The anſwer alſo ſtated, that the tenants had converted arable to meadow, and threatened to convert more.

(*a*) As to the meaning of the word "*Garba*" ſee the preceding caſe.

Mr. Romilly and Mr. Cox for the plaintiff ſhewed cauſe againſt diſſolving the injunction:

This is a ſubject of compenſation. The objection alſo is waived; not having been taken by the purchaſer from *Auguſt* till *December*: *Fordyce* v. *Ford* (*a*). In *Lowndes* v. *Lane*, as to compenſation, the eſtate not being tithe-free, as repreſented, Lord *Thurlow* went much into the application of the principle of "Caveat emptor (*b*);" and no doubt was entertained, that it was a ſubject of compenſation; and as there was a direct warranty, that it was tithe-free, compenſation was given as to that; but not as to the wood; with reſpect to which there was enough to put the purchaſer upon inquiry. In *Poole* v. *Shergold* alſo Lord *Thurlow* gave compenſation for ſome part; to which no title could be made. In that caſe was cited the caſe of a contract for a houſe and a wharf; and though no title could be made to the wharf, the purchaſer was compelled to take the houſe.

Mr. Mansfield and Mr. Heald for the defendant—There is no inſtance, in which a perſon contracting for all the tithes of a pariſh has been compelled to take half, or to take it ſubject to a modus, purchaſing tithe in kind. *Pincke* v. *Curteis* (*c*) came at laſt to this queſtion: the eſtate having been ſold as tithe-free, whether the exemption extended to after-purchaſed lands, recovered from the ſea. The ſubject of the purchaſe was an eſtate at *Gillingham*, part ſtated in the particular to be tithe-free. It turned out, that the land paid no great rectorial tithes under a title derived by grant from the Crown of the tithes with the land: but the Vicar was entitled to the ſmall tithes. Subſequent to the grant the land was recovered from the ſea. Upon exceptions to the report it came before Lord *Loughborough*, and for farther directions; who was finally of opinion upon great conſideration, that the purchaſer ſhould not be held to that purchaſe; certainly againſt the deciſions upon eſtates ſold tithe-free, which turned out to be ſubject to tithe. The ſame doctrine has prevailed in ſubſequent caſes; that if the man cannot have ſubſtantially the thing for which he contracted, he ſhall not be bound, though ſmall

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(*a*) 4 *Bro. C. C.* 494.

(*b*) *Oldfield* v. *Round*, *ante*, vol. 5. 508.

(*c*) 4 *Bro. C. C.* 329.

matters are the ſubject of compenſation. *Calcraft* v. *Roebuck* (*a*) went upon the miſconduct of the defendant: otherwiſe that contract could never have been performed.

Upon the circumſtances, there is nothing like a waiver. All, that paſſed, was a delivery of the abſtract in *Auguſt*. There was no negotiation about the title: nor was the defendant called upon to ſay, whether he would take it. The plaintiff acquieſced, till the defendant ſhould determine, whether he would take it, or not. He went down with a ſurveyor to make inquiries; the reſult of which appears in *October*. The principal of ſeveral objections was the modus for tithe of hay. That neceſſarily would compel him to agree with the tenants as to the tithe of corn. In *Fordyce* v. *Ford* the parties went on diſputing about the title; and it appeared clear, that the objection was waived. In *Lowndes* v. *Lane* the party only wanted compenſation; not objecting to his purchaſe.

Mr. Romilly in reply—There certainly have been inſtances of compenſation for tithes, as part of a large contract; when the vendor could make a title to every thing elſe; as in the caſe put of a contract for the purchaſe of land tithe-free; which is nothing but a contract for the land and the tithe. In all thoſe caſes the party has contracted for ſomething, which it is not poſſible to give him: but as that is not the great object of his contract, it is a ſubject of compenſation. The ſame argument applies, where the eſtate contains a leſs number of acres than repreſented. But this is a contract for tithes with other property; and the tithe of hay is of very inconſiderable value (*b*). The defendant certainly could not take till the day, on which the purchaſe was to be completed, to ſay, whether he would take it. He was bound to take the objection, as ſoon as it was known. What applications was the plaintiff to make? The moment the rental was put into the defendant's hand he knew the ſtate of the objection. All this time he was ſpeculating, whether he ſhould carry the contract into execution.

(*a*) *Ante*, vol. 1. 221.

(*b*) This was denied by the defendant.

1802.
Drewe
v.
Hanson.

Lord CHANCELLOR—Without meaning to ſay, what may be the final deciſion, I am of opinion, attending to all the circumſtances, it is too hazardous to ſay, there is not a fair and reaſonable queſtion, whether this contract may not be ſpecifically executed. It is certainly to be obſerved, that under the head of ſpecific performance contracts ſubſtantially different from thoſe entered into have been enforced. In the caſe of a contract for a houſe and a wharf, the object of the purchaſer being to carry on his buſineſs at the wharf, it was conſidered, that this Court was ſpecifically performing that man's contract by giving him the houſe without the wharf. So in *Shirley* v. *Davis*, in the Court of Exchequer, the ſubject of the contract was a houſe on the north ſide of the River *Thames*, ſuppoſed to be in the county of *Eſſex*; but which turned out to be in *Kent*; a ſmall part of which county happens to be on the other ſide of the river. The purchaſer was told, he would be made a church-warden of *Greenwich*; and though his object was to be a freeholder of *Eſſex*, he was compelled to take it. So in Lord *Stanhope*'s caſe the object was to get an eſtate tithe-free; and yet Lord *Thurlow* obliged him to take it ſubject to tithes.

In this caſe the hay-tithes were repreſented to be of ſo much of about 2,000 acres as happened to be employed in meadow: how much is not at all diſtinctly in proof. There is ſomething like a diſtinct repreſentation as to the arable land, but not amounting to a warranty. It appears alſo, that the corn tithe was really the principal part of the eſtate; that the farms were purchaſed for the purpoſe of enjoying the corn tithe eſtate. The aſpect of the particular is a farm in hand, rendered beneficial by the circumſtance, that the purchaſer would have the whole tithes of the pariſh of corn and hay; which is alſo ſome repreſentation, that the tithes are to be taken in kind; and I take it ſo as to the corn tithe; being paid for by annual compoſition. As to the nature of the payment for the moiety of the tithe of hay, it is not underſtood, whether it is a modus or a payment capable of being ſhaken in Law. It is impoſſible to deny, that the purchaſer under ſuch a particular is put in a ſituation of great hardſhip. The abſtract does not correct the repreſentation; as the rental in a degree does. If this caſe ſtands ſimply upon the repreſentation in the particular, the abſtract, and the rental, it would be within the authorities. That they are extremely ſtrong cannot be denied; and upon a motion for an injunction a precedent cannot be eſtabliſhed, to affect the vaſt claſs of authorities upon a point of ſuch importance, turning upon all their partcularities. In the caſe of an eſtate ſold tithe-free it is a prodigiouſly ſtrong meaſure in a Court of Equity to ſay, as a diſcreet exerciſe of its juriſdiction, that the contract ſhall be performed; the defendant ſwearing poſitively, and proving, that he would have nothing to do with the eſtate, if not tithe-free. That, though a very ſtrong propoſition, does not come up to this caſe; for in thoſe caſes the Court probably ſpeculates, that tithes and land are the ſubjects of ſeparate and accurate valuation; and the value of the one does not affect the other; and therefore, though there is a failure as to the tithes, a part only of the ſubject of the contract, the whole is not affected; as it would be, if the contract was for tithes only. Suppoſe it proved, that this farm was taken for the purpoſe of enjoying the corn tithe principally; that the hay tithe was a very ſmall object; great part of that capable of being taken in kind; but a ſmall part, not much affecting the bargain, liable to an exemption or modus: the Court in ſuch a caſe might decree upon the doctrine of compenſation. But it will be very different, if it turns out upon examination, that 1 or 2,000 acres are capable of being converted to the purpoſe of producing hay; or, that a part or the whole may be converted from arable to meadow. All thoſe conſiderations are very material upon the queſtion of compenſation; and it is impoſſible to determine now, that this will not be within the reach of ſome of the authorities a caſe for compenſation.

Upon the conduct of the party this may differ materially from *Fordyce* v. *Ford*. In that caſe, only ſeven acres were freehold; and all the reſt leaſehold: but the abſtract diſtinctly ſtated what was freehold, and what leaſehold. From the delivery of the abſtract it was perfectly underſtood beyond diſpute, without any ground for inquiry, that it was leaſehold unqueſtionably and irrevocably. The purchaſer receives the abſtract; treats upon it with full knowledge up to, and long after, the day, on which the contract was to be performed, not upon the nature of the property, but the title; and the Maſter of the Rolls thought, there was a clear waiver. I doubt extremely, whether that will turn out to be the caſe here. Taking the repreſentation in the converſation to be, that they believe it to be a modus, and ſuppoſing the purchaſer could have been off the bargain at that moment, which is very queſtionable, can it be ſaid from what paſſed afterwards, that he cannot now; having contracted under this repreſentation, and learning no more afterwards than that they conceive it to be a modus? That is not like the repreſentation as to the leaſehold property, but one requiring a reaſonable time for inquiry. Suppoſe, he had ſaid, he would take it notwithſtanding, if the quantity of land likely to produce hay was ſmall, or, provided it would not affect the value of the other part of the purchaſe: ſome time was neceſſary to inquire into that; to know, whether the tenants mean to convert the arable land into meadow, and can by that force him to an agreement as to his corn tithe. The anſwer ſwears, they threaten this; that they have done it in ſome inſtances; and mean it in more. The inference will depend a great deal upon the extent, to which the fact may exiſt; and till that is determined, I cannot ſay, whether this can lie in compenſation. If it goes to the deſtruction of the corn tithe, he not only loſes the hay tithe, but he does not get the thing, which is the principal object of the contract. It is not merely a ſmall abatement.

I cannot therefore decide (a) this cauſe upon the grounds now before me. There is queſtion enough, independent of the conduct of the defendant, to lay a fair ground for litigation. The Injunction muſt therefore be continued.

(a) The parties had preſſed for the opinion of the Lord Chancellor upon the queſtion.

BARKER *v.* DACIE.

1801.
Nov. 2.
18. 23.
Dec. 5. 15.
1802.
March 3.

Bill by a Clerk in Court againſt a ſolicitor for payment of a certain ſum, ſtated as the amount of the plaintiff's bill for fees and diſburſements. Demurrer to the relief over-ruled.

THE bill, filed on the 24th of *June* 1801, ſtated, that in 1780 the defendant, an attorney and ſolicitor, firſt began to employ the plaintiff as his clerk in Court in ſuch Chancery ſuits as he was concerned in; and the plaintiff having done buſineſs for the defendant for many years without receiving any money on account in *October* 1796 delivered a bill; and wrote a letter deſiring to have it diſcharged. The bill amounted to 46 *l.* 11 *s.* 8 *d.* The defendant ſent no anſwer to the letter; and concealed himſelf: but accidentally meeting the plaintiff aſſured him, that on the firſt day of the preſent *Trinity* Term he would call and diſcharge the account, and finally ſettle with the plaintiff.

The bill farther ſtated, that the defendant had no intention of ſatisfying the plaintiff's demand; but removed from place to place to avoid him and his other creditors; and that the ſum of 46 *l.* 11 *s.* 8 *d.* is now juſtly due to the plaintiff; and has been ſo for many years antecedent to the delivery of the bill; and in anſwer to the pretences, upon which it ſuggeſted, that the plaintiff refuſed to ſatisfy the demand, charged, that the defendant never paid plaintiff any money on account of his bill, and that he has no receipt or diſcharge, &c.; and prayed, that the defendant may be decreed to pay to the plaintiff the ſum of 46 *l.* 11 *s.* 8 *d.*, the amount of his aforeſaid bill of fees and diſburſements.

The defendant demurred to the relief for want of equity, and the plaintiff's remedy, if he is entitled to any relief, being at law; and as to the diſcovery anſwered; admitting, that he employed the plaintiff, and that a bill was delivered, but to what amount he is unable to ſet forth; and ſtated, that in 1790 he ceaſed to employ the plaintiff. He denied the promiſe to pay the bill, or ſettle the account; and, though he admitted having changed his reſidence, denied, that he did ſo to avoid payment of his creditors.

Mr. Roupel in ſupport of the demurrer—The demurrer is put in upon the ground, that this bill is merely an attempt to give a juriſdiction to this Court in a caſe admitting full and effectual relief at law. The relief is merely payment of a ſum of money. No equitable circumſtances are alleged. The only pretence is, that the plaintiff is an officer of this Court. The privilege in general holds; but applies only to ſuits, in reſpect of which the Court has juriſdiction; as, where there is a concurrent juriſdiction: but where, as in this inſtance, this Court has not the natural juriſdiction, the privilege cannot hold. If the clerk in Court is to be conſidered as an attorney or ſolicitor, the authorities are againſt ſuch a bill. There is an old caſe, Lord *Ranelagh* v. *Thornehill* (*a*) in ſupport of ſuch a ſuit: but ſubſequent caſes have eſtabliſhed the practice: *Parry* v. *Owen* (*b*); which, it is remarkable, is the caſe referred to in *Mitford* (*c*) as an authority, that this Court will not entertain a ſuit, where relief may be had at law. The caſe of *Fell* v. *Chriſt Church College, Oxford*, (*d*) ended in a compromiſe. The circumſtance, that this plaintiff is a clerk in Court, cannot change the juriſdiction from law to equity. If he has the privilege of ſuing at law, it muſt be in the Petty Bag.

Mr. Richards and Mr. Romilly in ſupport of the bill.—The general doctrine, that, a bill does not lie, where relief may be had in an action, is not diſputed; but this is not within that principle. This bill is not filed by an executor, but by the officer himſelf; whoſe duty calls him to attend the Court; and who is to be reſident in the Court and the offices belonging to it. Thence the privilege ariſes. The defendant is not a ſtranger, having no connection with the duties of the Court, as in *Parry* v. *Owen*; but is a ſolicitor. This demand ariſes from buſineſs done in this Court in the courſe of the plaintiff's duty, as clerk in Court, and the defendant's, as a ſolicitor. It would certainly be inconvenient to refer ſuch a ſubject to any other juriſdiction. Can the Maſter of the Court of *King's Bench* determine upon fees ariſing in this Court for buſineſs done here; receiving evidence, as he muſt, of the buſineſs in this Court. Clearly ſuch a demand can here only

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(*a*) 1 *Vern.* 203.

(*b*) *Amb.* 109. 3 *Atk.* 740.

(*c*) *Mitf.* 111.

(*d*) Before Lord *Thurlow*.

be determined with convenience, by analogy to thoſe caſes at law, where an attorney is privileged to ſue and be ſued in the Court, in which he practices, upon the principle of his neceſſary attendance. Though upon a legal demand, there is a concurrent juriſdiction. Upon a bill of coſts in a Court of Law, the principal being there gives the juriſdiction; and, if neceſſary, the Maſter or other officer will take to his aſſiſtance a perſon out of this Court.

The authorities are in favour of this bill; and there is no authority againſt it. The caſe cited from *Vernon* brought the merits diſtinctly before the Court upon a bill of review. In *Norris* v. *Bacon* (*a*) a plea of the ſtatute (*b*) was put in, on the ground, that plaintiff had not ſigned his bill; and that plea was allowed; which admits the juriſdiction. *Moor* v. *Row* (*c*) was the caſe of a bill by a barriſter; to which a demurrer was allowed, on the ground, that his fees were honorary; and therefore there was no remedy: but it ſeems to have been conceived, that if there was any remedy, it would be by bill in this Court. *Parry* v. *Owen* was the caſe of an executrix; and the report in *Ambler* muſt be erroneous. Clearly there could not have been a ſummary application; which can be made only by the client, not the attorney; and an executor is not within the ſtatute (*d*). The ground of the deciſion does not appear in *Atkyns*. In *Mitford* the caſe is only cited for the general propoſition. *Fell* v. *Chriſt Church College* was the caſe, not merely of fees, as clerk in Court, but of a bill of coſts as ſolicitor. The plaintiff put in a ſchedule of the bill of coſts. Lord *Thurlow* was much diſſatisfied; but did not allow the demurrer. It came frequently before the Court: but there was no deciſion; and it ended in the defendant's paying the demand to a great degree. That caſe is therefore a clear authority, that Lord *Thurlow* could not allow the demurrer. The argument upon it goes a great way in favour of this bill, merely for fees due to the plaintiff, as clerk in Court. *Tancred* v. *Cheater* (*e*) was a mixed caſe, between preciſely the ſame parties, but not wholly upon a bill of coſts. A great part of the demand however was a bill of coſts. The defendant inſiſted, the coſts ought

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(*a*) 1 *Vern.* 312.

(*b*) Stat. 3 *Jam. c.* 6.

(*c*) 1 *Rep. Ch.* 21.

(*d*) Stat. 2 *Geo.* 2. *c.* 23. *ſ.* 22.

(*e*) At the Rolls, before Lord *Alvanley*.

not to be inſerted. Lord *Alvanley* decreed an account generally; not conceiving, that the plaintiff was bound to go to law for the coſts: both parties being officers of this Court; and the buſineſs in this Court.

Such being the ſtate of the authorities, your Lordſhip will have to decide this caſe upon general principles. Thoſe being caſes of ſolicitors, this is much ſtronger; the caſe of a clerk in Court, ſuing merely for fees, to which he is entitled only under the Lord Chancellor's orders.

Mr. Roupel in reply—This is admitted to be a clear legal debt. The privilege, I admit, is in a degree perſonal, and in general caſes the officer is not to be drawn into another Court: but that is only in caſes of concurrent juriſdiction; where a remedy may be given here according to the ordinary principles, upon which this Court gives the remedy: not, where the remedy is completely at law. The inconvenience does not apply; as the plaintiff may ſue in the Petty Bag. The objection of this demurrer is, that he comes on the wrong ſide of the Court. It is not neceſſary, that the bill ſhould undergo taxation. It is ſaid, a clerk in Court is not entitled to fees, except under the order of the Lord Chancellor. That order would be evidence of his right; and then he may prove the items. It muſt be admitted, the party was not entitled to the remedy ſtated in *Ambler*'s report of *Parry* v. *Owen*: but it is clear, if the demurrer was wrong in that caſe, the deciſion muſt have been upon the general principle, that ſuch a bill does not lie for a ſolicitor's fees.

The judgment upon this demurrer was ſeveral times poſtponed, to give an opportunity for farther inquiry; and additional authorities were cited. 1 *Prax. Alm.* 306. a demurrer to ſuch a bill was over-ruled. A plea of the Statute of Limitations to ſuch a bill: 2 *Prax. Alm.* 283. Bill by a ſolicitor; to which an anſwer was put in, not a demurrer: *Curſus Cancell.* 41. *Hamilton* v. *Hodgſon*, 26th *April* 1746. *Langſtaffe* v. ——, 16th *April* 1774. A great many inſtances were produced of bills filed by ſolicitors and clerks in Court, ſigned by perſons of great character. *Colman* v. *Highmore*,

more, a bill by a clerk in Court, demanding a ſpecific ſum, 64 *l.* *Powel* v. *Edwards*, alſo a bill by a clerk in Court. *Hutton* v. *Marnon*, a bill by a clerk in Court, filed the 1ſt of *July* 1756. *Mears* v. *Mears*, 12th of *May* 1761: a bill by a clerk in Court againſt a ſolicitor for fees. A bill filed in 1711 by *R. W.* againſt *M. D.*; to which an anſwer was put in: but the record was not found. *Robinſon* v. *Ellis*, another inſtance. The reſult is a clear courſe of practice, though not verified by decrees. It was ſaid, there were ſeveral other inſtances of bills by clerks in Court againſt ſolicitors for fees; but they were all ſettled without any anſwer put in.

On the other ſide it was ſaid, that three only of the bills appeared to have been actually filed: one was *Powel* v. *Edwards*: a bill by a clerk in Court; not againſt the debtor himſelf, but his executors, for an account of his perſonal eſtate and ſatisfaction out of his aſſets, involving a variety of other things: a bill, that might have been filed by any creditor; and it ſtated ſeveral difficulties in proſecuting the claim at law; alleging, that the witneſſes were all dead.

The bill in *Mears* v. *Mears* was filed: but no appearance was entered; and it does not appear, whether a ſubpœna iſſued. That bill alleges various ſums received from the defendant on account of the plaintiff's bill; that the vouchers had been delivered up; and no evidence could be produced at law; but that upon an account a balance would appear due to the plaintiff. In ſuch a caſe, an account and mutual credit, excluſive of any other circumſtance the juriſdiction was clear.

Colman v. *Seymour* comes nearer this point than any other caſe; containing none of thoſe other equitable circumſtances, excluſive of that of privilege. A copy of the bill is produced: but it is not known, whether any appearance was put in, or any thing was done under it.

In the inſtance cited from *Prax. Alm.* publiſhed among a variety of precedents, the plaintiff introduced charges to give the Court juriſdiction; that he was at a great charge in ſuing out ſeveral writs, &c.: inſtead of relying upon a broad principle or known practice, labouring to protect himſelf againſt a demurrer by thoſe allegations. The prayer was, that the defendant ſhould ſhew cauſe, why he ſhould not come to an account. The demurrer to that bill cannot be found. The caſe in *Curſus Cancell.* was a bill for an account: the defendant had arreſted the plaintiff; and the bill alſo prayed an injunction. Theſe inſtances do not eſtabliſh ſuch a clear courſe of practice as to enable your Lordſhip to ſupport this bill either upon practice or any known principle.

Lord Chancellor—I have been furniſhed with what appears in the Regiſter's Book as to the caſe in *Vernon*; which being upon a bill of review is a deciſion of great importance. But it does not quite ſatisfy me. The reaſon given is, that the party ſhould have demurred, and not have permitted it to go to a hearing. The rule now is, that if you could have demurred to the bill, the Court will not make a decree at the hearing.

No decree, where the defendant might have demurred.

In *Mears* v. *Mears* there is a very material charge; that the Clerk in Court had delivered his vouchers to the defendant. Conſequently he could not poſſibly go on at Law; and then the obſervation applies, that wanting diſcovery, the Court gives relief, particularly in matters of account.

March 3. General demurrer lies, the plaintiff being entitled to diſcovery, but not to the relief.

Lord Chancellor—In this cauſe the plaintiff and the defendant are both officers of this Court. The defendant has not availed himſelf of the rule, that has lately obtained; that if the plaintiff is not entitled to the relief, he ſhall not have the diſcovery (*a*); but has adopted a courſe, that prevailed in times, not very remote, by demurring to the relief and anſwering to the diſcovery. The queſtion is, whether a Clerk in Court, dealing in that character with a Solicitor, as ſuch, can file a bill for an account and payment of the balance: or, to put it more pointedly to the circumſtances, whether the Clerk in Court ſtating this caſe, and that a ſum is due, can maintain the ſuit: the defendant reſiſting the demand, as not due in the whole or in part; but not ſhewing, what part has been paid, and how the account ſtands.

(*a*) See the references, *ante*, vol. 3. 347.

It is objected, that the bill cannot be ſuſtained for ſeveral reaſons. Firſt, it is ſaid, the demand is purely at Law; that if the bill pointed to a proper ſubject of this juriſdiction, it ought to have been merely for diſcovery, to enable the plaintiff to get evidence in ſupport of an action; and farther, that if there is any thing in the character of the plaintiff, giving him a perſonal right of ſuing here, he ought not in a matter of this ſort to ſue in this Court, as a Court of Equity, farther than to have a diſcovery; and having had that he ought to bring an action in the Petty Bag.

I do not at preſent go, for it is unneceſſary, into any detailed obſervation upon the paſſages in the books of practice as to the right of a Clerk in Court to ſue, not any body, but a Solicitor, by bill. Such paſſages are to be found certainly. Nor ſhall I go into any particular obſervation upon the forms of pleading in ſuch caſes, which are alſo to be found there, nor into obſervation upon the various caſes, many of which were cited, proving, that ſuch bills have been entertained, and acted on, perhaps a little diverſified in their circumſtances. I barely ſtate the inference ariſing from the fact, that many inſtances are cited of bills by Clerks in Court againſt Solicitors for fees; which have been ſigned by the moſt reſpectable perſons; and which, though not matured into decrees, are ſo far authority, that the defendants ſubmitted. Theſe proceedings ſatisfy me (and fully to this extent, that I ought not to allow the demurrer) that the practice has been underſtood to be, that a Clerk in Court may ſue a Solicitor for an account of their dealings and tranſactions in that relation; and may ſue him by bill in Equity. I believe, it will be found, that the Solicitors are very modern officers of the Court, compared with the Clerks in Court (*a*); and in the nature of the buſineſs and the manner of tranſacting it that it will reſt frequently more in the knowledge of the Solicitor, what he is indebted to the Clerk in Court, than in the knowledge of the Clerk in Court, what demand he has; and there may be an account, which is to be ſettled by a production of papers furniſhed to the Solicitor by the Clerk in Court; which will regulate the demand upon the Solicitor. This Court therefore, as it decrees and deals in matters of account from the inconvenience at law, aſſuming the credit of taking the account

Solicitors modern officers of the Court compared with Clerks in Court.

with

(*a*) See the petition, *Ex parte The Six Clerks*, *ante*, vol. 3. 589.

1802.

BARKER *v.* DACIE.

Account conſequential upon diſcovery; though there may be a proceeding at Law.

with regard to proceedings in the Court and the fees upon them better than, or at leaſt as well as, a Court of Law, has been in the habit of conceiving and expreſſing a ſtrong inclination to entertain juriſdiction in matters of this ſort; and where diſcovery is wanted, we know, it will be followed up by taking an account; even where there may be a proceeding at law. I am of opinion, this plaintiff might bring an action at law; provided he had the evidence; and we remember, the caſe of Mr. *Hill* and the Six Clerks went to law (*a*). I was ſurpriſed to hear, Lord *Roſslyn* expreſſed a doubt, whether any Judge would try a cauſe between officers of this Court (*b*). If the officer had a legal right, the Judge could not refuſe to try it. But it does not follow, that, becauſe he has a legal right, he may not ſue here. It depends in ſome degree upon the uſage and the inherent juriſdiction of the Court to compel its officers to do juſtice to each other, particularly in the matter of fees. As this bill is framed, it is as bold an experiment as the plaintiff could make; and perhaps the defendant might have put upon the Record a defence, that might have made it difficult to ſuſtain the bill, unleſs upon ſuch inherent juriſdiction, to be exerciſed not only by petition but by bill. The plaintiff takes upon himſelf to ſtate, what is the reſult of the account, and therefore to remove all difficulty; reducing himſelf to the ſituation of a perſon having a clear liquidated ſum, incapable of being entangled. But upon the true nature of the bill I rather think, what he meant was to ſtate, that there was an account; that he had collected the reſult of it at this ſum; and I rather think, this mode of ſtating the bill, alleging, that this ſum is due, and a promiſe to pay it, was meant to take it out of the Statute of Limitations, rather than with reference to what was conceived to be the juriſdiction of the Court. The bill is capable of being ſo underſtood; and if not, rather than ſhake what ſeems a privilege of the officers of the Court, I would allow the plaintiff to amend.

I do not think upon conſideration, any of the caſes cited on the other ſide diſtinctly apply as authorities againſt this bill; for the Court is to deal very differently, when dealing with the executor of an officer of this Court, contending againſt an officer, and between two officers of the Court. There is a diſtinction in the

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(*a*) *Ante*, vol. 3. 596, 597.

(*b*) That was intimated at the Bar.

relation of the parties; which may perhaps account for ſome of the caſes referred to; which are very ſhortly reported; and of which I have not been able to procure farther information. Under all the circumſtances the habit of the Court gives ſo much of negative authority, that this demurrer ought to be overruled. I do not know, that there is great inconvenience even in filing a bill. With an inclination, that a motion might be made, or a petition preſented, I alſo am of opinion the defendant might relieve himſelf from the bill; admitting, that he was a Solicitor; and deſiring upon motion a reference to the Maſter to take the account: the ſuit would be ended; and the Court as to coſts would have an opportunity of finally doing juſtice. Upon the whole there is authority enough for overruling the demurrer; whatever may be the decree at the hearing.

Demurrer overruled (*a*).

(*a*) The defendant paid the demand.

THE UNIVERSITIES OF OXFORD AND CAMBRIDGE *v.* RICHARDSON.

March 1, 2, 3.

Upon the anſwer to a bill by the Univerſities of *Oxford* and *Cambridge*, the King's Printer not joining, but being made a defendant, an injunction, reſtraining the ſale in *England* of bibles, prayer-books, *&c.* printed by the King's Printer in *Scotland*, was continued to the hearing.

THE bill ſtated, that by ſeveral Letters Patent before and ſince the 13th year of Queen *Elizabeth* the plaintiffs are intruſted with the eſpecial privilege and authority of printing within their reſpective Univerſities, and of ſelling or cauſing to be ſold throughout His Majeſty's dominions or elſewhere all manner of books and works of whatever deſcription, not prohibited by public authority, and whether the ſame may be or not contained or mentioned in any other Royal Charter or Grant to any other Printer; and that under their ſaid reſpective grants and privileges they are entitled to print within their ſaid reſpective Univerſities, and to ſell within the ſame and elſewhere, all editions or copies of the Holy Bible, New Teſtament, and book of the Common Prayer, Adminiſtration of the Sacrament, and other rites and ceremonies of the Church of *England*, in concurrence with ſuch perſon or perſons, who for the time being may be his Majeſty's Printer; and that no other perſon or perſons or body corporate whatever beſides the plaintiffs and his Majeſty's Printers for the time being or their aſſigns are entitled to print or publiſh within *England*

England any editions or copies of the Holy Bible, *&c.*; or to ſell within *England* any other edition or copies of the ſaid books than ſuch as have been printed and publiſhed by or for the plaintiffs and the King's Printers for the time being or their aſſigns or one of them; and that the plaintiffs together with the King's Printers for the time being have reſpectively from time to time printed and publiſhed and ſold for a reaſonable price a conſiderable number of editions and copies of all the ſaid books fully adequate to the neceſſary uſe of and actual demand from time to time made for them by all his ſaid Majeſty's ſubjects within *England*, and adapted in ſize, number, execution and price, for the accommodation of all ranks and deſcriptions of his ſaid Majeſty's ſubjects; and that they have reſpectively been at great pains and expence in preſerving the text of the ſaid books pure and correct, and of furniſhing a ſufficient ſupply of all the ſaid books for the uſe of his Majeſty's ſaid ſubjects, and more eſpecially of late years have reſpectively printed and publiſhed ſo great a number of editions and copies of all the ſaid books, that for ſeveral years laſt paſt his Majeſty's Printers have not found it neceſſary to print any new editions or copies of the ſaid books, but have left the due ſupply thereof wholly to the plaintiffs; who have reſpectively employed a very large capital in ſuch printing and publiſhing.

The bill farther ſtated, that by Letters Patent, dated the 8th of *July* in the 39th year of his reign, his preſent Majeſty granted to *John Reeves*, *George Eyre*, and *Andrew Strahan*, to each of them, and each of their executors, adminiſtrators and aſſigns, for a term of years therein mentioned, and not yet expired, the office of Printer to His Majeſty amongſt other things of all bibles, *&c.* thereby forbidding all other perſons whatſoever within *England* from printing any of the ſaid books, or from importing and ſelling any of the ſaid books printed out of *England* during the time in the Patent mentioned; and that the intereſt of *John Reeves* in the ſame has by meſne aſſignment become veſted in *Eyre* and *Strahan*; and the plaintiffs and *Eyre* and *Strahan* having lately diſcovered, that ſome attempts have been made to invade their ſaid privileges, *Eyre* and *Strahan* joined with the plaintiffs in publiſhing an advertiſement, that they will take ſuch meaſures againſt all printers and vendors of the ſame as they are warranted to do for the protection of their rights, and preventing the publiſhing and vending the Holy Scriptures and Liturgy of the Church by any other than thoſe, who have juſt licence and authority for the ſame; and the plaintiffs in *September* laſt finding, that the ſame illegal practices were perſiſted in by many Printers and Bookſellers throughout *England* cauſed a hand-bill to be circulated among the trade in general giving them notice of the plaintiff's intention of immediately inſtituting a ſuit in this Court againſt the invaders of ſaid privilege.

The bill then ſtated, that *William Richardſon* and *John* and *James Richardſon* of *London* have taken upon themſelves to print and publiſh within *England* divers copies or impreſſions of the *Engliſh* Bible, New Teſtament, and Book of Common Prayer, without the privity, conſent or authority, of *Eyre* and *Strahan*, or of the plaintiffs; or the ſaid defendants have imported and ſold, or expoſed for ſale, within *England*, divers copies or impreſſions of the ſaid books printed out of the ſaid realm or within the ſaid realm without the privity or conſent of *Eyre* and *Strahan*, or the plaintiffs; and that the ſaid defendants have lately imported from *Scotland* or elſewhere, not within *England*, divers copies of the *Engliſh* tranſlation of the Bible in quarto, and printed reſpectively in *Scotland* or elſewhere, not within *England*; and have in *London* or elſewhere within *England* ſold or expoſed for ſale divers copies or impreſſions of the ſaid books reſpectively. The bill then charging, that the plaintiffs have ſuffered conſiderable loſs; and have already been conſiderably impeded, and are daily ſuffering more ſerious interruptions, in being enabled to furniſh his Majeſty's ſubjects within this realm with a proper ſupply of the ſaid books from the unjuſtifiable practices, as herein before charged, of ſaid defendants; and that the defendants *Eyre* and *Strahan* have refuſed to join in this ſuit, prayed an injunction and account.

The defendants, the *Richardſons*, by their anſwer ſubmitted, that they are entitled to ſell in *England* editions and copies of the ſaid books, which have been printed and publiſhed by his Majeſty's Printers. They ſtated, that they believe, it may be true, that the plaintiffs or the perſons delegated by them have from time to time printed and publiſhed a conſiderable number of editions

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The Univerſities of Oxford and Cambridge *v.* Richardſon.

and copies fully adequate to the neceſſary uſe of, and actual demand by, all his Majeſty's ſubjects in *England*, and adapted in ſize and number (but not in execution or price, as the defendants believe) for the accomodation of all ranks and deſcriptions of his Majeſtys ſubjects, and have been at great or ſome pains and expence in preſerving the text pure and correct, and in furniſhing a ſufficient ſupply; and have employed a very large or ſome capital in printing and publiſhing the ſaid books; that an advertiſement of ſuch tenor, as in the bill, was publiſhed; and that a hand-bill of ſuch purport was generally circulated throughout the trade. They believe, that the ſaid delegates and not the plaintiffs publiſhed ſaid advertiſement; and circulated the ſaid hand-bill. They deny, that they have printed and publiſhed within *England* any copies or impreſſions, or any of the books, in the bill mentioned; but admit, that as partners in trade, and in exerciſe of their privileges as *Britiſh* ſubjects and Freemen of the City of *London*, they have imported from *Scotland*, and no where elſe, and ſold in *London*, but not elſewhere within *England*, divers numbers of one edition of the ſaid books; of which they have ſet forth an account; and ſay, that all the copies and impreſſions, ſo imported and ſold by defendants, were printed and publiſhed by and for the King's Printers in *Scotland*; and were ſold by the defendants on their own account; and they inſiſt, that the King's Printers in *Scotland* for the time being are duly authoriſed and privileged to print and publiſh the ſaid books in *Scotland*; and that theſe defendants are authoriſed to ſell the ſame in *England*; for by Letters Patent under the Seal by the Treaty of Union of *England* and *Scotland* to be kept and uſed in *Scotland* in lieu of the Great Seal of that kingdom, dated the 2d of *November* in the 26th year of his preſent Majeſty, reciting Letters Patent, dated the 21ſt of *June* 1749, during forty-one years from the expiration of the Patent granted by King *George* the 1ſt, dated the 6th of *July* 1716, for forty-one years, His Majeſty nominated *James Hunter Blair* and *John Bruce*, their heirs, ſubſtitutes, or aſſigns, his ſole Maſter Printers in *Scotland* for forty-one years from the expiration of the Patent then exiſting, with full power to uſe, exerciſe, and enjoy, the ſaid gift and office during the ſpace before mentioned, with all the profits, emoluments, immunities, exemptions, and privileges, to the ſame belonging, as

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far as agreed with the articles of the Union and the exiſting Laws of *Great Britain*, and eſpecially the ſole and excluſive privilege of printing in *Scotland* Holy Bibles, New Teſtaments, Books of Pſalms, Books of Common Prayer, Confeſſions of Faith, and the larger and ſhorter Chatechiſms in the *Engliſh* language.

The anſwer farther ſtated, that the Letters Patent granted to *Kincarde*, and Letters Patent to other perſons prior thereto, contained, as defendants believe, the like privileges and authority; and inſiſted, that ſuch books as have been, and may be, printed under the excluſive authority and privilege given by ſaid Letters Patent to the King's Printers in *Scotland*, did become a ſubject of property or article of trade within the Act hereinafter mentioned in the ſame manner as books printed under the excluſive authority granted to the King's Printer in *England*; and that in conſequence of the Act of Union the perſons authoriſed by the ſaid Letters Patent to print the ſaid books in *Scotland* have a right to ſend ſuch books into *England*, and there to ſell the ſame; and in like manner the perſons authorized to print the ſaid books in *England* have a right to ſend ſuch books into *Scotland*, and there to ſell the ſame; and for forty years paſt, and, as defendants believe, for many years previous, ſuch practice hath not been conſidered illegal or contrary to the Letters Patent.

The anſwer then ſtated, that the defendants admit, they did ſell the ſaid books ſo printed in *Scotland* under the ſaid authority, and imported, without the privity of plaintiffs and the King's Printers in *England*; and inſiſt, that it was not neceſſary to obtain the conſent or authority of Plaintiffs and the King's Printers in *England*. They deny, that they have imported, or ſold, or expoſed to ſale, any edition, copies, or impreſſions, printed out of *Great Britain*; and ſay, the copies printed by the plaintiffs are ſelling in *London* at 17 *s.* 3 *d.*; and the copies printed by the King's Printers in *Scotland* ſold in *London* at 11 *s.* 2 *d.* only: and the quality of the paper, and the type, printing, and execution, of copies printed in *Scotland* are very ſuperior to, and better adapted for the uſe of the public than, the copies printed by the plaintiffs or their delegates; and that the text is equally pure and correct; and the defendants have frequently heard complaints from the bookſellers and others, not only of the prices, but alſo of the quality, printing, and execution, of the copies printed by the plaintiffs or their delegates; which they believe well founded. They believe, His Majeſty's Printers in *England* have not given to the plaintiffs or their delegates any privilege or authority whatſoever either for printing or publiſhing the ſaid books in *England*, or for preventing the defendants from ſelling in *London* copies printed and publiſhed in *Scotland*; and his Majeſty's printers in *England* do not directly interfere with that part of the trade; and ſay, defendants and other perſons have for many years paſt carried on a very extenſive and valuable trade with foreign countries, and particularly with the United States of *America*, by exporting copies of ſaid books, publiſhed in *Scotland*, and brought into *England*; and unleſs permitted to be ſold, as heretofore, they believe, not only ſuch valuable branch of trade will be deſtroyed, or very greatly diminiſhed, but a conſiderable revenue ariſing from the duties on the paper and leather will alſo be loſt to *Great Britain*.

A motion was made for diſſolving the Injunction upon the anſwer put in.

Mr. Plumer, Mr. Alexander, and Mr. Thomſon, in ſupport of the motion—This is a queſtion of conſiderable importance. To ſuſtain an Injunction under the notion of irreparable waſte the plaintiffs ought either to have eſtabliſhed their title at Law, or to have been in actual poſſeſſion of the excluſive privilege. The general queſtion is, whether the ſubjects of this kingdom may not buy and ſell what by the King's authority is printed within the realm. The prerogative even does not go ſo far; being confined to the printing and publiſhing: the reaſon of the prerogative ceaſing there. The plaintiffs claim a monopoly injurious to the great intereſts of the public. The Attorney General is not a party. The claim is not made on behalf of the King's printer; who is made a defendant; declining to aſſert the claim made by theſe plaintiffs. The bill ſeeks, not only an Injunction to reſtrain the ſale of theſe books, (the prayer being confined to the ſale, though the charges go alſo to the printing,) but alſo an account of the profits already made. The Injunction prayed is to reſtrain them from ſelling theſe books any where. An Injunction is not granted, unleſs the legal right is eſtabliſhed at Law by deciſion or by long uſage: if not, the

Court will have the right eſtabliſhed: *Hills* v. *The Univerſity of Oxford* (*a*); in which cauſe the plaintiff was the King's printer; and an Injunction till the trial was refuſed. In *Millar* v. *Taylor* (*b*) all the Judges expreſs themſelves in the ſame way as to Injunctions in the Court of Chancery; that ſuch Injunction never is granted on motion, unleſs the legal property of the plaintiff be made out; nor continued after anſwer, unleſs it ſtill remains clear: that the Court never grants Injunctions in caſes of this kind, where there is any doubt: a doubtful legal title muſt be tried at Law, before it can be made the ground of an Injunction, *&c.* (*c*). In this bill they have not ſtated the inſtruments, upon which their own title or that of the defendants is founded; but the general reſult only of the inſtruments, under which they claim; and the import and effect only in general terms of letters patent and charters, by which without doubt this among other privileges is granted to them. They have ſet forth the letters patent 39th *Geo.* 3. to the King's printer; which purport to impoſe a negative upon every other perſon. Nothing in theſe letters patent can ſtrengthen the plaintiffs' title. They attempt to unite themſelves with the King's printer; who ſingly poſſeſſes the right; ſtating alſo, that the King's printer has not for ſeveral years exerciſed the right; but has left it entirely to the plaintiffs. The bill contains no averment, that the books ſold by the defendants are in any reſpect inferior in the execution, or in reſpect of the price calculated to impoſe upon the unwary. The anſwer ſwears, that the type, paper, and execution, are in all reſpects ſuperior, the text equally correct; and the price a third leſs. The intereſt of the public is the main foundation of this prerogative. All, that reſpects the printing, is certainly the juſt ſubject of monopoly; on account of the important duty upon his Majeſty to ſupply his ſubjects with theſe books: but, when they are printed, every principle oppoſes a reſtraint of the ſale on behalf of the King or any claiming under him. That is the true principle, governing the Law upon this ſubject, and recognized in a very important Act of Parliament. According to Mr. *Yorke*'s very elaborate argument (*d*) the prerogative is limited to printing and publiſhing or importing from foreign

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(*a*) 1 *Vern.* 275. (*b*) 4 *Bur.* 2303. (*c*) 4 *Bur.* 2377. 2400.

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but alſo of the quality, printing, and execution, of the copies printed by the plaintiffs or their delegates; which they believe well founded. They believe, His Majeſty's Printers in *England* have not given to the plaintiffs or their delegates any privilege or authority whatſoever either for printing or publiſhing the ſaid books in *England*, or for preventing the defendants from ſelling in *London* copies printed and publiſhed in *Scotland;* and his Majeſty's printers in *England* do not directly interfere with that part of the trade; and ſay, defendants and other perſons have for many years paſt carried on a very extenſive and valuable trade with foreign countries, and particularly with the United States of *America*, by exporting copies of ſaid books, publiſhed in *Scotland*, and brought into *England;* and unleſs permitted to be ſold, as heretofore, they believe, not only ſuch valuable branch of trade will be deſtroyed, or very greatly diminiſhed, but a conſiderable revenue ariſing from the duties on the paper and leather will alſo be loſt to *Great Britain*.

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The conſequence, ſtated by the plaintiffs is the injury to their private property, not to the public. The pecuniary loſs is the ground made; and the account is prayed in reſpect of that. The object of the letters patent, generally referred to in the firſt paragraph of the bill, is all manner of books, not prohibited by public authority; and is not confined to books of this deſcription. There is a broad diſtinction between the nature of this right and the right of a patentee. The plaintiffs do not repreſent, that the letters patent have given them more than a privilege and authority. They ſpeak of an excluſive right, only, when uniting themſelves with the King's printer. But theſe defendants are not called upon to argue the queſtion with the King's printers or the King. The title, as ſtated, is nothing but a licence to them with impunity from the penalties of the Star-Chamber, to print and ſell: but no right of property, no controul over others, is given; which appears from the certificate (a) in *Baſkett* v. *The Univerſity of Cambridge*. What right has a perſon purchaſing a licence from a patentee to call in queſtion the exerciſe of the invention by another perſon; much leſs, to have an account. Where is the legal right, infringed by the publication of another? How would they declare upon their right? Muſt they not aver, that they are entitled to the excluſive right? Are the defendants liable to account to more than one perſon? Suppoſe after the account granted to the perſon licenſed the patentee ſhould come for an account. There were five patents: two to the Univerſity of *Cambridge*; and three to *Oxford*. That granted in the 26th year of King *Hen.* 8th to *Cambridge* has no mention of bibles, prayer books, &c.; which were not the object of that patent, being previous to the tranſlation of the bible. The others were in the 3d, 8th, and 13th *Charles* 1. One was a confirmatory patent, giving particular rights over other books, long hid in the libraries, having no reference to theſe books; but as to thoſe others, never before publiſhed, giving an excluſive right for twenty-five years and ten years. The charter, 11th *Char.* 2., was alſo merely confirmatory. All theſe amount to nothing more than a licence. The plain language is ſo; and more was never contended for than an Exception in favour of the Univerſities of a right to print, unfettered by the excluſive right of the King's printer.

(a) 1 *Vern.* 275. (b) 4 *Bur.* 2303. (c) 4 *Bur.* 2377. 2400.

(d) 1 *Burn*'s Eccl. Law, 353. In the quarto edition the ſubſtance of the patents is ſtated.

(a) 2 *Bur.* 664. 1 *Burn's* Eccl. Law. 373.

In *Baſkett* v. *The Univerſity of Cambridge* (*a*) this was ſo conſidered. They argued againſt the univerſality of the monopoly. In *Hills* v. *The Univerſity of Oxford* the Lord Keeper ſays, it was never meant, they ſhould print more than for their own uſe, or a ſmall number more to compenſate their charge. The right, upon which theſe defendants inſiſt, the authority of the King's printer in *Scotland*, giving an expreſs power and excluſive right to print theſe books in that country, is as good as that of the King's printer in *England*. The printing and publiſhing being legal, the only queſtion is, whether the ſale can be controlled by the plaintiffs. Can this be called an unauthoriſed, pirated, edition? In *Eyre and Strahan* v. *Carnan* (*b*) the ground of the prerogative was laid down, not as property, but duty; to take care, that theſe books are correct. Theſe books are properly printed under the King's authority: where, is of no conſequence. This authority is recogniſed by Act of Parliament, allowing a drawback upon paper uſed for the purpoſe of printing bibles and prayer-books in *Scotland*, in the ſame manner as to the King's printer and the Univerſities in *England*. The ſale is not a ſubject of reſtraint; unleſs when the books are not printed under proper authority; as where books of this kind are printed abroad. The competition is of infinite benefit to the public; of which this caſe is an inſtance. The danger of eſtabliſhing ſuch a monopoly in the ſale would be very great: the object being to furniſh the public upon eaſy terms; proper care being taken to preſerve the text correct. Theſe books, when printed under proper authority, are as much a ſubject of ſale as any other, under the fifth article of the Union. This limitation would be contrary to all the Statutes giving an unlimited right of trade, and particularly the Act of Union; as a grant of the right of printing and publiſhing with the exception of a particular county in *England* would be illegal. Upon the argument of the plaintiffs books of this kind, purchaſed in *Scotland*, and being part of the library of a gentleman, coming into

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(*a*) 2 *Bur.* 661. 1 *Burn's* Eccl. Law, 347. (*b*) In the Court of Exchequer 1781.

this country, could not be ſold. The anſwer ſtates the uſage for a great length of time, and the plaintiffs ſtate no more; not pretending, that they have ever exerciſed controul, or that books of this kind have not always been ſold with impunity. The controul now ſet up is ſuſtained neither by authority nor uſage. A very conſiderable export trade will be ſtopped by this monopoly. Every improper addition to the price of ſuch books is a tax upon the peaſantry of this country; and the mere reſervation of a rent upon the leaſe of this privilege is a conſiderable and unneceſſary addition. Under this uſage, the right never having been eſtabliſhed at law, this cannot be ſtated as a clear caſe; and your Lordſhip will take the ſame courſe, that was adopted in *Hills* v. *The Univerſity of Oxford*; in which caſe the title was eſtabliſhed by acts of Parliament, *&c.* A great loſs has been already ſuſtained by the reſtraint of this injunction.

The Solicitor General, Mr. Manſfield, Mr. Richards, and Mr. Romilly, for the plaintiffs ſhewed cauſe againſt diſſolving the injunction.

The neceſſary conſequence of the defendants' ſucceſs in this trade from the difference of the price of labour, *&c.* muſt be to beat down completely the intereſt of the Univerſities under their Patents, if the difference in the price that is repreſented, exiſts; and the defendants will have a monopoly. It will not however turn out, that there is that difference upon articles of equal value. It has been decided, at leaſt as between the King's Printers in *England* and *Scotland*, that the right now contended to be in the latter does not exiſt. The argument upon the articles of Union proceeds upon miſtake. It might as well be contended, that after the Union a Citizen of *London* might exerciſe the privileges of a Citizen of *Edinburgh* there, and *vice verſâ*. The meaning of that clauſe is only, that the ſubjects of *Scotland* ſhall have the ſame privileges in *England*, that the ſubjects of *England* have, *&c.*; not to enable them to do that in *England*, which the ſubjects of *England* cannot do. The Patents to the King's Printers in both countries are evidently confined to each reſpectively. With reſpect to the paſſages (a) cited from *Millar* v. *Taylor*, the intermediate paſſage ſhews the origin of the doubt in *Tonſon* v. *Collins*; which doubt is now fully removed by what paſſed in *Baſkett* v. *Parſons* (a); when the very queſtion was before the Maſter of the Rolls; and a perpetual injunction was decreed. Afterwards in 1720 or 1721 an application was made againſt the defendant *Parſons* for breach of the injunction by having brought books of this ſort into the Kingdom; upon which application he was committed for a contempt. That deciſion received farther confirmation in the Houſe of Lords upon an appeal from a decree of the Court of Seſſion in *Scotland*; which was varied in favour of the right of the King's Printer in *England*, confining the right of the *Scotch* Printer to *Scotland*. That caſe was *Baſkett* v. *Watſon* (b). The defendant was the King's Printer in *Scotland*. The interlocutor was, that the defendant might print and ſell bibles in any part of the United Kingdoms or elſewhere. It was ordered in the Houſe of Lords, that the interlocutor ſhould be varied by leaving out the words "in any part of the united "kingdoms, or elſewhere:" as to the reſt it was affirmed. The right therefore upon theſe authorities cannot be conſidered doubtful.

(a) 4 *Bur.* 2400.

The ſtate of the two countries is aſſimilated to the caſe of two counties in *England*. It is not to be preſumed, that the King would limit the ſale of theſe books within his dominions: but by virtue of the prerogative he may ſubdivide and apportion the grant; and it would be extremely difficult for the grantee to ſell or enable another to ſell beyond thoſe limits in direct oppoſition to that reſtraint. Notwithſtanding the Union, for all the municipal juriſdiction of the Great Seal, for all the purpoſes of acquiring rights under the Great Seal, the countries remain as diſtinct, as formerly. What would be the privilege and advantage of the right to print only? The object is the publication and ſale. If the ſale cannot be reſtrained, the prerogative is fruitleſs.

As to the right of the plaintiffs, it is a concurrent right with the right of the King's Printer; which is excluſive of every one

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(a) Before Sir *Joſeph Jekyl* at the Rolls, 8th *July* 1718; and upon appeal before Lord Chancellor *Parker*, 2d *May* 1719; when the decree was affirmed.

(b) In the Houſe of Lords, 16th of *January* 1717.

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elſe. The Attorney General was not a party in the caſe at the Rolls. This right certainly has not been taken as a mere licence. In Mr. *Yorke*'s argument it is called a privilege; as a grant operating upon the right of the Crown; and granting a right and intereſt in the thing; which was in the Crown to grant. There is no reaſon to apprehend, they would be liable again to account to the King's Printer. That muſt be arranged in this ſuit; in which, as he is before the Court, care will be taken of his intereſt. How can theſe defendants argue againſt monopoly, claiming under a monopoliſt? The only queſtion is, who ſhall have it: all claiming under a grant from the Crown an excluſive right againſt all perſons, except thoſe appointed by the Crown, like a licence for a market. The exerciſe of this monopoly is granted to the univerſities by way of trade. The object upon the charters appears to have been to grant all the advantage, that could be derived from carrying on the trade of printing and ſelling theſe books. Though the expreſſion is general "all books," it muſt be underſtood to be reſtrained to what are called prerogative copies. The clear excluſive right in the King being admitted, how can it be diſputed againſt his grantee: the King reſerving the right of granting the ſame privilege to other perſons; as was done afterwards to the Printer; in which grant there are excluſive words, preventing a farther grant to any other perſon. That grant neceſſarily makes the right of the Univerſities excluſive, with the exception of the right of the King's Printer. This cannot be compared to a licence to uſe a patent invention, nor to a grant of the right of fiſhing in the water of another. There is no doubt, every perſon claiming under ſuch a grant may bring an action for the invaſion of the right, like the action of a commoner. A Perſon having the grant of a market may bring an action againſt any one ſetting up another within the limits: *Yard* v. *Ford* (*a*). Grants of fairs, markets, fiſheries, *&c.* conveying very valuable rights to a ſubject, are mere authorities; and if thoſe common law liberties and franchiſes are uſurped, the remedy is by *quo warranto*. All thoſe rights, proceeding from the Crown, are mere authorities. There is no argument therefore againſt a right, that it is by licence. It is not of courſe to direct an account, which is only adopted as a juſt and fair mode of eſtimating the damages. A diſcovery is neceſſary in thoſe

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(*a*) 2 *Saund.* 172.

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caſes; and then the habit of the Court is to direct an account, inſtead of ſending it to law to eſtimate the damages; obliging the party to ſue in two Courts. This injunction would not prevent exportation to foreign countries, perhaps even through this country: the object being only the ſale in *England*. The word "importing" in the caſe at the Rolls muſt be underſtood to be for the purpoſe of ſale in this country. The inſtance put of books in a private library could not come within the deſcription of trading; unleſs made uſe of as a cover. The uſage cannot be ſet up againſt theſe ſolemn deciſions. This trade was probably carried on at firſt, ſo as not to admit of detection; and was detected by degrees: ſo that it was not an object to apply, until it grew to ſome magnitude. Thoſe caſes alſo have decided, that it is not neceſſary, that all perſons, having intereſts in the monopoly, ſhould be parties; as in thoſe neither the Crown nor the Univerſities were parties. The effect of that objection would be, that the King's Printer by refuſing to be a co-plaintiff might put an end entirely to the right of the Univerſities. As to the objection upon the account (*a*), thoſe *dicta*, that the account ſupports the injunction, began with the caſe of an injunction to reſtrain cutting timber. In the common caſe of waſte there is no doubt, that the Court perpetually interpoſes, where there can be no account; as in the inſtance of a tenant digging clay for bricks, an injunction is obtained immediately: ſo in caſes of copyright before publication: *Pope* v. *Curl* (*b*). The principle is, that the Court will not ſuffer ſuch rights to be invaded; and it is very convenient from the difficulty of getting at what ought to be the ſubject of the account. In *Jeſus College* v. *Bloom* (*c*) Lord *Hardwicke* ſays, the damage is the ground of the injunction, in direct oppoſition to that notion as to the account; which is there treated as following the juriſdiction to grant the injunction. In *Selby* v. *Selby* there could be no account. The intention to commit waſte is alone ſufficient; and the allegation always is of an intention to commit waſte; alſo, that the defendant has cut a tree, or put a plough in the ground, not for the

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(*a*) A difficulty was ſuggeſted by the Lord Chancellor as to the way, in which the account ſhould be taken, with reference to the King's Printer, upon the ſuppoſition, that the injunction is ſupported by the account: his Lordſhip expreſſing at the ſame time an opinion againſt the accuracy of the *dicta* to that effect.

(*b*) Before Lord *Hardwicke*, 5th *June* 1741.

(*c*) 3 *Atk.* 262.

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purpoſe of an account, but as deciſive evidence of his purpoſe. The injunction is the relief, not any thing interlocutory. In *Jackſon* v. *Cator* (a) it was clear, there could be no account; the right to the trees being expreſsly reſerved: yet the injunction was granted; and afterwards made perpetual (b). The difficulty of aſcertaining the proportions will not prevent the right of the plaintiffs to an account in the firſt inſtance, upon the principle of copyright; as this is in effect. The Court may reſerve the right of deciding as to the proportions: but it is clear, the defendants are not entitled to retain the profits.

Mr. Plumer in reply—The intermediate paſſage (c) in Lord *Mansfield*'s judgment in *Millar* v. *Taylor* only refers to a particular caſe; going to obviate the idea of any doubt entertained upon the queſtion of literary property: but that paſſage does not affect the reſult of what I cited for the general principle, that there muſt be a clear, plain, caſe; or the right muſt be eſtabliſhed at Law. Upon this queſtion there is very conſiderable doubt, what will be your Lordſhip's opinion, or that of a Court of Law. The ſuppoſition, that this uſage commenced in wrong, aſſumes the queſtion. This is the firſt attempt againſt this uſage; for *Baſkett* v. *The Univerſity of Cambridge* was upon a new attempt to extend the right, to printing acts of Parliament. Neither of thoſe caſes has decided this queſtion. In that before the Houſe of Lords the queſtion did not ariſe; and as it was not in iſſue, the interlocutor was properly corrected. The queſtion was merely between perſons claiming as proprietors of the patent, *inter ſe*, whether *Watſon* was entitled to any participation in the patent, or not. The certificate in *Baſkett* v. *The Univerſity of Cambridge* goes a great way againſt the caſe at the Rolls. This queſtion is perfectly diſtinct from all queſtions of property, private right, and pecuniary emolument. This is a ſubject of public truſt, not of private emolument. It would be an abuſe of the privilege, where it is found to interfere with the primary object, for which the privilege exiſts. The private right, if it militates with the public object, muſt give way. Upon private patent-rights the main object is the private advantage and emolu-

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(a) *Ante*, vol. 5. 688.

(b) See alſo *Gibſon* v. *Smith*, 2 *Atk.* 182. where a threat to open mines was held a ſufficient ground for an Injunction.

(c) 4 *Bur.* 2400.

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ment of the patentee, as a remuneration to him. The intereſt of the public is to multiply the ſellers. The commodious ſupply of the public with theſe books is the main object; and if the article is made by royal authority, it is immaterial, who ſells, or, where it is ſold. The controlling principle is to facilitate the object and leſſen the expence. The univerſities could not exclude each other, or the King's printer, from ſelling, or even from printing in *Oxford* or *Cambridge*. In *Baſkett* v. *Parſons* there was evidence of fraud upon the patent by introducing books printed in *Holland* under the pretence, that they were printed in *Scotland*; and that being the main object, the Injunction was general, againſt importing contrary to the patent. All the uſage ſubſequent to *Baſkett* v. *Parſons* is contrary to it. That deciſion therefore cannot preclude the diſcuſſion. An intention to grant a monopoly cannot be preſumed; and the words do not import it. Licence and monopoly are perfectly diſtinct. At the date of the charter of *Hen.* 8. theſe prerogative copies did not exiſt. That could only be effectual as a licence; for a monopoly extending to all manner of books could not be granted. The Star-Chamber had a general power over the preſs at that time. All theſe patents were exiſting before the abolition of that Court. They were mere protections againſt the ſeizure of the books and the interruption of printing by the Star-Chamber. Mr. *Yorke* contended only for the right of doing the thing, not for an excluſion. The inſtance of the grant of a market is not like this. That in its nature is an excluſive right.

Lord Chancellor—I am perfectly ſatisfied, that, if the King's printer was a plaintiff, theſe defendants muſt be injoined; that what they are doing is not according to law. The doubt I have is, whether theſe plaintiffs are the perſons to injoin: but, notwithſtanding that, as there is no doubt upon the illegality of what the defendants are doing, I ſhould not ſcruple to injoin them till the hearing.

The conſtruction put by Courts of Law upon theſe letters patent is, that notwithſtanding the generality of the terms, giving that power or right, whatever it is, they give the Univerſities the faculty of multiplying the copies belonging to the King; and no objection as to the generality of the terms has been held to affect the validity of thoſe powers, which the King may lawfully grant. The licence or authority given by the letters patent confines them to the power of printing in the limits of the Univerſities; not excluding the King's printer or others; unleſs they can upon their own ſtatutes, confirmed perhaps by act of Parliament. The purpoſe of the power expreſſed in the letters patent is the ſale out of the Univerſities, and not only that, but any where in the King's dominions; and certainly theſe words are very large: but if the queſtion aroſe with reſpect to *Scotland* alſo, the anſwer would be the ſame, that is to be inferred from the certificate in *Baſkett* v. *The Univerſity of Cambridge*; that the prior patent to the *Scotch* printer would exclude them; and that upon the true conſtruction of all the patents it was not intended, that the books they ſhould print within the Univerſity ſhould be ſold in *Scotland*. It is not however neceſſary to decide that. Whether they and the King's printers have printed more or leſs, provided there is a ſufficient ſupply for the ſubjects of this country, is immaterial; if they have a concurrent authority. The allegation, that they have employed a large capital, is a material allegation; for the duty cannot be exerciſed without great expence; and then every infringement, having a tendency to defeat the purpoſes of that expence incurred in the neceſſary eſtabliſhment for the execution of that duty, has a tendency, not only to the pecuniary damage of thoſe entruſted to diſcharge it, but alſo to put an end to the regular ſupply by authoriſed perſons of books, which the conſtitution has ſuppoſed to be of ſuch a ſpecies, that the public ought to have a ſecurity, that the publication ſhall be ſuch as it ought to be, not in ſubſequent inquiries, but previous checks and regulations to this extent; that it ſhall be by ſome perſons, whom the law intruſts with it, as matter of duty. With reſpect to the patent of the King's printer, engaged in printing acts of Parliament, proclamations, and other acts of State, and poſſibly they may be entitled to print the annals of Courts of Juſtice (the year-books, I ſee, are mentioned), the eſtabliſhment neceſſary for ſuch a concern is of ſuch extent, if the right is to be exerciſed according to the duty, that perhaps if the Crown had granted a revocable patent, nothing could be found more contrary to the intereſt of the public than to ſtop ſuch an eſtabliſhment at a moment's warning; nor any thing more detrimental to the prerogative; as the eſtabliſhment neceſſary for ſuch a concern cannot be ſpeedily provided.

I entertain a very ſtrong doubt, whether, if the plaintiffs could not maintain the ſuit without making the King's printer a defendant, they can do ſo, making him a defendant; for the ſuit proceeds upon a notion, that they have in themſelves a right to reſtrain; which will carry along with it a right to call upon the Court to injoin and for an account. It does not neceſſarily follow, that, becauſe the King's printer has that right, theſe plaintiffs have it: nor, that if they have not that right without joining him, they will acquire it by joining him in it as a plaintiff. In the nature of the plaintiff's intereſt there muſt be a right to injoin: or this ſuit would not be capable of being maintained, becauſe the King's printer is made a defendant. If a duty is impoſed upon the King's printer in the nature of his right to prevent any perſon infringing it, and the conſequence of his exerciſing his right according to his duty would be, that his right would generate a protection for the right of the Univerſities, whatever is the ſpecies of it, and that upon his public duty he can be called on to exerciſe that right, to the intent of giving that protection to theſe plaintiffs, that is not the caſe this bill aims at, or the principle, upon which it is framed. The argument of reciprocity, that *Scotch* books may be ſold here, and *Engliſh* books in *Scotland*, aſſumes the queſtion; for thoſe, who contend, that books printed in *Scotland* cannot be ſent to *England*, admit, that books printed in *England*, cannot be ſent to *Scotland*.

Injunction where there can be no account.

One queſtion, which does not connect itſelf immediately with the nature of the title of the plaintiffs, but would have had a place for diſcuſſion equally, if the bill had been filed by the King's printer, is, whether, if the Court cannot find an accurate mode of eſtimating the profits, an Injunction can be granted. Suppoſe it now admitted, that the King's printer had, I do not ſay a concurrent authority (though it may be inferred, from ſome modes of reaſoning upon the certificate in *Baſkett* v. *The Univerſity of Cambridge* that the King's printer had but an authority), but a concurrent copyright, which Mr. *Yorke* ſuppoſes may exiſt in theſe matters, with the Univerſities, taking each of them to have a concurrent copyright with him: if the bill was filed by the King's printer himſelf, the difficulty of ſaying, what ſhare of the profits he was entitled to, would have been as great as the difficulty of eſtimating the profits in the caſe, as it is admitted to exiſt. The

King's printer having by admiſſion prohibitory clauſes in his patent, and ſuppoſing for the argument the plaintiffs had alſo, can it be contended, that on account of that difficulty they ſhould not have that equity, which this Court adminiſters as preventive juſtice for the very purpoſe of prohibiting others from making profit, and with the very intent perhaps, that the difficulty of eſtimating the profits ſhall not work an injuſtice to the plaintiffs. I am of opinion, that, if it would be a due diſpoſal of this caſe to ſend it to a Jury upon an iſſue, *quantum damnificatus*, as to each of the perſons, which the Court often does, yet the right to the injunction, to prevent in future that, which is unjuſtly done or threatened, would be ſufficient to ſupport the bill.

Injunction to prevent that, which is unjuſtly done, or threatened.

Caſes may be put clearly illuſtrative of that. Suppoſe, a tradeſman going out of trade leaves three partners; who give him a conſideration for retiring; the partnerſhip between thoſe remaining to exiſt for three years; and afterwards it is underſtood, that the retiring partner is to carry on the trade for his own benefit, covenanting not to carry it on within five miles of the others, which would be legal, either during or after the partnerſhip about to take place: after that partnerſhip ceaſed, and ſplit either into two and one or three ſeparate perſons, if that covenant was with each and every of them, each would have a right to reſtrain him; and yet the queſtion, how much any one was damnified, or had loſt, could never be duly decided without taking into conſideration, what the reſpective profits would have been; and the caſe would have every difficulty upon an iſſue. Suppoſe, in the caſe of Lord *Byron* (a) there had been a variety of mills upon that ſtream: I do not ſay, they would have a concurrent right in the uſe of the water, though they would in this ſenſe, that each was to have it: but the Court would have enjoined at the inſtance of any one; as he would have a complete title in himſelf. The caſes as to waſte, where it is threatened (b), and no account can therefore be due, alſo, where the waſte is ſo inſignificant, that even a Court of Law under an old ſtatute would have a right to remit the damages, if minute, are all caſes, where there can be no account; and yet to prevent that miſchief the party has a right to an injunction, not only to the

(a) *Robinſon* v. *Lord Byron*, 1 *Bro. C. C.* 588.

(b) *Gibſon* v. *Smith*, 2 *Atk.* 182.

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Injunction granted or continued to the hearing, though the legal title doubtful; as upon Patent rights.

hearing, but a perpetual Injunction, if the circumſtances warrant it.

It is then ſaid, in caſes of this ſort the univerſal rule is, that, if the title is not clear at law, the Court will not grant or ſuſtain an injunction, until it is made clear at law. With all deference to Lord *Manſfield*, I cannot accede to that propoſition ſo unqualified. There are many inſtances in my own memory, in which this Court has granted or continued an injunction to the hearing under ſuch circumſtances. In the caſe of patent rights, if the party gets his patent, and puts his invention in execution, and has proceeded to a ſale, that may be called poſſeſſion under it, however doubtful it may be, whether the patent can be ſuſtained, this Court has lately ſaid, poſſeſſion under a colour of title is ground enough to enjoin, and to continue the injunction, till it is proved at law, that it is only colour and not real title. There have been ſeveral inſtances of late. Can it be ſaid, that patent in the caſe of *Boulton* and *Watt* (*a*) was not doubtful? The Court of Common Pleas were divided upon the validity of it. Upon the firſt argument in the Court of *King's Bench* they were inclined to hold it bad: but they altered their opinion; and decided in favour of it. This Court enjoined them all the time during the pendency of the proceedings at law, upon the ground, that they had had poſſeſſion of the invention under colour of the title, a patent queſtionable in that degree gave. That declaration therefore is not to be underſtood in that unqualified manner.

Another caſe, without ſtating more, cited in the argument, is *Baſkett* v. *Parſons*, before Sir *Joſeph Jekyll*, an authority of a very high nature. From that authority, upon that very point, under the very circumſtances exiſting in this cauſe, there was an appeal; and that decree was affirmed, and in a period, which directly connects itſelf with the proceeding in the Houſe of Lords in the other cauſe, whatever may be the preciſe nature of it. This is the authority of Sir *Joſeph Jekyll*, confirmed by the Lord Chancellor; and pointedly with regard to the queſtion now addreſſed to the Court; and afterwards the Lord Chancellor explains the decree; which was to reſtrain the King's Printers in *Scotland*.

(*a*) *Boulton* v. *Bull*, 2 *H. Black.* 463. *ante*, vol. 3. 140. *Hornblower* v. *Boulton*, 8 *Term Rep. B. R.* 95.

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That is not only an authority upon the point of the right of the King's Printer in *England* to reſtrain the King's Printer in *Scotland*, but alſo upon the point, whether the Court will injoin, and continue the injunction to the hearing, before any trial at law upon the point. The ſame thing occurred in Lord *Byron's* caſe; who diſputed the right of the plaintiffs: but an injunction was ordered, that he ſhould ſo manage his pond-head till the trial, as it had been managed previouſly to that day, upon which the complaint was made. If therefore there was an abſolute, invincible, difficulty in taking the account, the conſequence would be only an iſſue *quantum damnificatus*: yet if the right was in a due ſenſe, ſufficient for this bill, concurrent in the plaintiffs and the King's Printer, that right to reſtrain would be a ſufficient ground to come for an injunction, in order to prevent the ſpecies of miſchief by infringement of the excluſive right; even if under the circumſtances according to the rules of this Court the plaintiff could only have brought an action; and the bill will not neceſſarily finally fail, if it turns out, that they cannot have an account or an iſſue *quantum damnificatus*; and that the only relief they can have is the injunction.

The next queſtion is as to the right of the defendants, ſtated by their anſwer. If it can be ſuſtained, it muſt go to this; that the King's ſubjects in *Ireland* have, notwithſtanding any patent like this granted to the King's Printer in *Ireland*, a right to introduce into that country books printed by the King's Printer in *Scotland*; and that the King's ſubjects in *Scotland* have a ſimilar right to bring into *Scotland* books printed in *England* or *Ireland* by the King's Printer. Independent therefore of authority, the propoſition aſſerts a right in the King's ſubjects to controul his grant in a moſt material and efficacious way. It is familiar, that if a Patent for an invention is confined to *England*, it would not extend to *Ireland*. If a diſtinct Patent is granted for *Ireland*, the very circumſtance of taking them under the diſtinct Great Seals, which are ſtill diſtinct for that purpoſe among others, ſhews the reaſon; and time is always required with regard to the day, at which the enrolment of one patent is to be made, on account of the purpoſe to get a patent elſewhere; and it is always underſtood, that the right in a patent for one country is confined to that; and would not enable the party to bring the article for ſale

Since the Union of *Great Britain* and *Ireland* the Great Seals are diſtinct for Patents among other purpoſes.

into the other. Yet upon all thoſe caſes the argument is perplexing: but that is in the nature of the thing. It might be aſked, whether the King's ſubjects could not buy that article in *Ireland*, and bring it here; and if any one did, whether it might not be ſold as part of his effects. To that I do not know an anſwer. It is enough to ſay, if it is legal, that circumſtance has not ſtood in the way of this propoſition; that you cannot bring thoſe articles here for the purpoſe of trading. That circumſtance belongs rather to the neceſſity of the habits of life; and has never prevailed againſt the law, protecting the ſole right of the party.

But it is ſaid, this caſe differs from that of a patent invention for a watch, *&c.*: in ſuch a caſe the Common Law right is not carried on by the King's authority; and that authority gives the right to introduce it into this country. It is a ſtrong propoſition, that the King's authority is by implication to do that, which, giving the authority, he expreſſes it is not his intention to authorize; for the Patent to the King's Printer not only does not contain any intention to give it for that purpoſe, but expreſſes a different intention, ſo ſtrong, that implication to the contrary is impoſſible. Then what is the law upon the ſubject? The language of the Patent importing, that this is againſt the right, it muſt be proved; not by any neceſſary effect of the King's grant; conſidering that he granted particularly to *Scotland*, not as part of the ſame kingdom; for he was not then King of both countries as one realm; and his grant as King of *Scotland* could hardly be fairly taken into conſideration in conſtruing upon principles of *Engliſh* law his grant as King of *England*.

But it is much ſafer to apply to authority upon the direct point than to reaſon it eighty years after the deciſion upon ſpeculation. This deciſion of *Baſkett* v. *Parſons* was three times made in this Court at the ſuit of the King's Printer upon books, which he had the ſole right to ſell in *England*; that a ſubject cannot buy under the authority of the patent for *Scotland* ſimilar books printed there for the purpoſe of importing them into *England*, in order to ſell them there. It is ſaid, you are to look at the *bona fides* of the thing; and the truth was, that they were printed in *Holland*, and imported as if printed in *Scotland*. The Record is a complete anſwer to that argument; for though the plaintiff alleges, the defendant bought elſewhere than in *Scotland*, the defendant avers, he had bought in *Scotland*; and inſiſts, that as a ſubject and under the particular effect of the articles of Union he had a right to ſell in *England* what he averred he had bought in *Scotland*. Sir *Joſeph Jekyll* reſtrained him upon the point. If he had made a caſe, that would have been only for the aſſiſtance of his judgment; not ſending it to a trial at law. But he takes upon himſelf, as he might, to decide the law; and by the decree reſtrains the defendant from ſelling all theſe books in the manner, in which he contended he was entitled to ſell them. From that decree there was an appeal to the Lord Chancellor, who affirmed the decree; and afterwards there was a ſubſequent application againſt the defendant for a contempt; and then he raiſed this point, that *Scotland* was not a foreign country; and the Lord Chancellor ſays, the decree meant to reſtrain him as to books printed by the King's Printer in *Scotland*; deciding that to be an infringement of the right of the King's Printer here, againſt which the Court will injoin.

The effect of uſage and underſtanding, as amounting to that poſſeſſion, which is ſo much regarded in granting or continuing Injunctions, ought to be attended to. In *Baſkett* v. *The Univerſity of Cambridge* the Univerſities had not been in the habit of printing Acts of Parliament; and the want of that habit was much regarded by the Court; who ſent a caſe, even before they would grant the Injunction upon a doubtful queſtion in favour of thoſe, who never had the poſſeſſion. But in this caſe the uſage and poſſeſſion are affected by prior uſage and poſſeſſion, confirmed by judgment of law, the validity of the right under the other diſtinctly before a Court of Juſtice, and three times determined to be againſt law. If this uſage was ſtronger than it appears in this anſwer, it would not authoriſe me to declare, that has ceaſed to be law, and given way to uſage. Here there is no ſuch thing as a law going into deſuetude; and modern uſage cannot be regarded as of equal authority with the judgment of this Court.

I do not ſtate the judgment of the Houſe of Lords as a direct judgment upon the queſtion. But, attending to the grounds, upon which it is put, and the neceſſary connection with the judgment of this Court at that period, it cannot be repreſented as indifferent,

different, or deſtitute of all authority upon this point. I am of opinion, I am not at liberty to conſider this upon the ground of ſuch poſſeſſion as is repreſented on the part of the defendants as ſufficient to prevent the continuance of this Injunction; and I lay no ſtreſs upon the circumſtance of having granted the Injunction; which was upon general allegations, that books came from other parts as well as *Scotland*. But I cannot regard ſuch poſſeſſion as ſufficient to prevail againſt a judgment of this Court unſhaken and this acquieſcence under it.

But the queſtion ſo put is with regard to the King's Printer. It was decided at his ſuit; that he is entitled to ſay, it is illegal, as againſt him; and it is another queſtion certainly, upon the point, whether the Univerſities have a right to reſtrain; and in that reſpect this caſe is very peculiar. If it ſhould turn out finally, that they have not that right, there will be a miſcarriage in reſtraining at their ſuit: but that will be in a caſe, in which theſe defendants will have as little right to complain as can be imagined; for the peculiar diſtinction of the caſe is, that the reſtraint will be upon a perſon, who, upon theſe authorities it muſt be admitted, has no right in law to do what he is doing; and the complaint can only repreſent, that he may have a title to do what is unjuſt againſt the complaint of theſe parties, but not againſt another perſon, repreſenting the crown; from which theſe corporate perſons derive their authority. If it can be repreſented to be doubtful in a degree, whether theſe plaintiffs can reſtrain, my opinion is, that the public intereſt may be looked to, upon a ſubject, the communication of which to the public in an authentic ſhape, if a matter of right, is alſo matter of duty in the crown; which are commenſurate. The principle of the law is, that this duty and this right are better executed and protected by a publication of books of this ſpecies in *England* by perſons confided in by letters patent under the Great Seal of *England*. If that is the principle, the queſtion cannot be raiſed, whether a communication of the privilege by the introduction of *Scotch* and *Iriſh* books would be beneficial. Upon that ſuppoſition the law will rather interpoſe a guard againſt the conſequences by previous reſtraint, than correct them afterwards; for another reaſon too; that, as the *Scotch* and *Iriſh* printers are not obliged to bring them here, the period may arrive, when having by the introduction of their

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editions deſtroyed the *Engliſh* eſtabliſhment, and, when no ſufficient eſtabliſhment is left here to ſupply theſe books according to the right and duty of the Crown, they may retire from it. It is not accurate to ſay, theſe privileges are not granted for the ſake of unlimited ſale, and for the benefit of the Univerſities, *&c.* They are to a certain degree, like all other offices, calculated for that ſort of advantage, that will ſecure to the public the due execution of the duty; upon this principle, pervading all the branches of our conſtitution (which does not adopt the wild theories, that require the execution of a duty without a due compenſation), that the duty is well ſecured in one way by giving a reſponſibility in point of means to the perſon to execute it. Where the fees are fixed, they are the due reward. Where they are not aſcertained, the benefit ſhall be reaſonable; and if an unreaſonable price ſhould be placed upon theſe works, theſe authorities and patents would be put in conſiderable hazard. The profit alſo ought to be calculated with a view, not only to ſecure preſent advantage, but, that the eſtabliſhment may be continued in the country.

As to the argument upon the compariſon of the text, the prices, *&c.* I have nothing to do with the monopoly, and the queſtion, which edition is beſt; if it is matter of legal right, upon a confidence impoſed by the law. But if the ſaleſmen are driven out of the market, the price will be raiſed; and then all that advantage would vaniſh; as in the inſtance of a ſalmon fiſhery, that I remember. The reaſoning, which affects to depreciate monopoly, will perhaps tend to create it; and it is impoſſible to forget the relative price of labour in theſe two countries upon ſuch a queſtion.

I do not now inquire, whether the King's Printer by not joining in this ſuit to reſtrain theſe defendants is doing juſtice to his duty under this patent. But the next conſideration is, whether there is in the authorities given to the Univerſities, attending to the true nature of the poſſeſſion, which I ſay upon that authority has been in them, reaſon to think, that at their ſuit the Injunction may be ſuſtained at the hearing. This is ſaid to be a mere licence. There is conſiderable doubt, whether it is not in its nature very like that to the King's Printer; though he has it under the denomination of a grant of the office; which however as to

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the execution of the duty is nothing but an execution of authorities given to it. I doubt, whether Mr. *Yorke* is correct in conſidering theſe patents as veſting the King's copyrights. It may very well be argued, that they remain ſtill veſted in the King; and the grants are nothing more than authorities to exerciſe the right of multiplying thoſe copies, which, if not granted, remain veſted in the King, exerciſing them according to the public neceſſity, charging reaſonably. It is true, there is a fee granted; and there are prohibitory clauſes: but I doubt much, whether, if the grant purported to be of the whole of his authority for ſuch a period, that prohibitory clauſe is really neceſſary; whether the grant of all his authority would not as neceſſarily for the benefit of the patentee prohibit others from printing as prohibitory clauſes; for the nature of the King's authority is excluſive. There is alſo ground in the certificate in *Baſkett* v. *The Univerſity of Cambridge* for conſidering the grant of the office as really nothing more than a grant of authorities. The expreſſion is, that the Univerſities " are entruſted with a concurrent authority." Whether others have more authority muſt depend upon the effect of the inſtruments. But if the grant is nothing more than of the King's authority, there is a neceſſary excluſion. The officer muſt of neceſſity have the duty as well as the right of excluſion, from the duty of the Crown on behalf of the ſubject to exclude others. The effect of that certificate is, that with reſpect to prior patents to the King's Patentees, they had the effect of preventing the King from granting concurrently to the Univerſities; which could have no operation, till the prior patents ceaſed. If the grant to the Univerſities had been as univerſal in point of extent, inſtead of being limited, upon the ſame principle it muſt have been held, that the grant to the King's Printer ſubſequent to that to the Univerſity could have had no effect: but it was held a grant of part of that intereſt, which had been granted by the prior grant; and which would take effect, when the prior grants ceaſed to have effect; that it has become ſplit; this grant being only to print in the Univerſities, and ſell every where in *England*: the other, to print every where. They are conſiſtent in this ſenſe. The two Patents amount to an apportionment into different proportions of the authority, carrying along with it the duty, and therefore in ſome degree the right to exclude. Mr. *Yorke* ſo conſiders it, and puts it ſtrongly, as a concurrent right to print, and then it muſt be to exclude. It would be extraordinary, if it depends upon the King's Printer, whether the Univerſities are to have that, which they had in a manner to his prejudice, without the leaſt benefit.

Under the circumſtances therefore theſe Plaintiffs have that intereſt in them, which entitles them to have this injunction continued to the hearing. The injunction relates only to *England*. I do not apprehend it to mean, that theſe parties ſhall not ſell *Scotch* books in foreign countries.

Injunction continued.

March 4, 5, 6.

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The property of an *American* loyaliſt having been confiſcated during the *American* War, ſubject to the claims of ſuch of his creditors, as were friendly to *American* independence, to be made within a limited time, and in fact according to the evidence farther reſtrained to the inhabitants of the particular State, a bill to have bonds delivered up, or to compel the creditor to reſort in the firſt inſtance to the fund ariſing from the confiſcation, was diſmiſſed; on the ground, that it did not appear, that the creditor had the clear means of making his demand effectual againſt that fund: the Lord Chancellor alſo expreſſing an opinion in favour of the right to ſue perſonally even in that caſe, againſt the authority of *Wright* v. *Nutt* (3 *Bro. C. C.* 326. 1 *Hen. Black.* 136.)

The object of this bill was the ſame as in the cauſe of *Wright* v. *Nutt* (*a*), to compel creditors of the late Sir *James Wright*, who was Governor of the Province of *Georgia* in *North America* at the commencement of the *American* War, to deliver up their ſecurities; or at leaſt in the firſt inſtance to reſort to the *American* Government for ſatisfaction out of the fund ariſing from his confiſcated property. The particular circumſtances attending this debt were theſe.

Sir *James Wright* executed two bonds, dated the 21ſt of *September* 1768, and the 8th of *March* 1769, each for 5,000 *l. Carolina* currency, borrowed from the obligee *Benjamin Smith* of *Charleſtown*. In *Auguſt* 1770 *Smith* died, leaving his brother *Thomas Smith* and *John Motte* and others his executors. The defendant *John Simpſon*, of *London*, who was his limited adminiſtrator with the will annexed under a power of attorney from *Motte*, the ſurviving executor, as to ſums due to him, brought an action in *Trinity* Term 1791.

(*a*) 3 *Bro. C. C.* 326. 1 *H. Black.* 136.

Upon the diſturbances breaking out in *America*, Sir *James Wright* having fled, in *March* 1776 an Act of Aſſembly paſſed in the State of *Georgia*; enacting, that he and ſeveral other perſons ſhould be attainted, and adjudged guilty of high treaſon, and ſhould be liable to ſeveral penalties; and all their eſtates and property, real and perſonal, were thereby confiſcated, and declared to be in the actual poſſeſſion of the State; and a Board of Commiſſioners was appointed; who were to ſell all the real and perſonal eſtates of the perſons named in the Act; and the monies ariſing by ſuch ſales were to be paid into the Treaſury of the State; and all perſons having any demand upon the forfeited eſtates were to lay their claims before the Board; and after liquidating all ſuch claims on the forfeited eſtates the Board was to empower the Sheriff to ſell the eſtates both real and perſonal by auction for the money of that State only, and to the inhabitants, being actually citizens of and reſidents within the ſame; and the perſons having any claims or demands on the eſtates of the attainted perſons were to make the ſame before the expiration of ſixty days after the paſſing of that Act, or to loſe their claims.

In 1778 the King's troops having taken poſſeſſion of the Province of *Georgia*, Sir *James Wright* returned, and reſumed his government: but upon the evacuation of the Province by the King's troops, he and the other perſons, who had adhered to the *Britiſh* intereſt, were again compelled to fly; and by an act paſſed by the Houſe of Aſſembly on the 4th of *May* 1781, after the declaration of independence, reciting the former act, it was enacted, that Sir *James Wright* and many other perſons ſhould be, and were thereby baniſhed from that State for ever; and, if they returned, ſhould be guilty of felony without benefit of clergy; and that all the eſtates both real and perſonal of all the ſaid perſons, with all debts, dues and demands, whatſoever due to them, ſhould be confiſcated to the uſe and benefit of that State; and the monies to ariſe from the ſales, which ſhould take place by virtue of that Act, ſhould be applied to ſuch uſes as that Legiſlature ſhould direct; and that all debts, dues and demands, due to merchants or others reſiding in *Great Britain*, were thereby ſequeſtered; and the Commiſſioners appointed by the ſaid act were thereby empowered to recover, receive, and depoſit, the ſame in the Treaſury of the State in the ſame manner as debts confiſcated, there to remain for the uſe of the State; and reciting, that there were ſeveral juſt claims and demands, which might be made by the good and faithful citizens of that State and others of the United States of *America* againſt the eſtates confiſcated by that act, it was enacted, that any perſons well affected to the independence of the United States, having debts owing them from the perſons named in that act, or, who had any juſt claim in law or equity againſt any of ſuch confiſcated eſtates, ſhould bring his claim or enter his action within the ſpace of twelve months from the paſſing of that act; and in default thereof every ſuch perſon ſhould be for ever debarred from deriving any benefit from the ſame.

The act then pointed out the mode of proceeding for ſuch creditors; either by claim before the Commiſſioners, or by action at law; in which caſe the ſum recovered was to be paid by a certificate, to be iſſued by the Governor or Commander in Chief; which certificates were to be taken in payment for any purchaſe at the ſales of the confiſcated eſtates.

By other acts of the State of *Georgia* and of Congreſs Sir *James Wright* was rendered incapable of ſuing any perſon in *Georgia* or any other of the United States.

The bill, which was filed in 1791 by the executors of Sir *James Wright*, ſtated, that upon his firſt flight from the province of *Georgia* he left there all his property to the amount of 90,000*l.*; and all his plantations and property were finally ſeiſed, and ſold; that *Motte* and the other executors were well affected to the *Americans*; and therefore they have, or might have, obtained payment; that Sir *James Wright*'s loſs was under the commiſſion for inquiring into the loſſes of loyaliſts aſcertained at the ſum of 30,000*l.*: but the Commiſſioners took into their conſideration the amount of the debts due to perſons friendly to *America*; for the payment of whoſe debts proviſion was made by the *American* Government out of the confiſcated property; and that applications were made by Sir *James Wright* and by his executors to *Motte* and the other executors to reſort to the confiſcated property in *America* under the acts of Aſſembly.

The bill prayed, that the bonds may be delivered up; or, if the plaintiffs are liable in Equity, that the defendants may in the firſt place ſeek ſatisfaction out of the confiſcated property; and that the plaintiffs may anſwer only the ſurplus beyond what might be ſo ſatisfied; and for that purpoſe that an account may be taken of what the executors of *Smith* have or might have received without negligence or default.

The anſwers of *Simpſon* and *Motte* admitting the acts of Aſſembly, and the confiſcation, *&c.* ſubmitted, that they were not bound to reſort to the confiſcated property; ſtating, that the defendants believe, Sir *James Wright* in 1776 and 1778 carried away the whole or great part of his moveable property, particularly negroes and ſlaves; and that he wrote to *Thomas Smith*, promiſing to pay the debt to his brother's eſtate. *Simpſon* ſtated his belief, that *Motte* and the other executors were inhabitants of *Carolina*, and might be friends to the ſtate of *Georgia*. *Motte* ſtated, that he does not believe, *Benjamin Smith* had at any period the moſt diſtant wiſh for the independence of *America;* having been at all times a loyal ſubject, and having died ſeveral years before the war; but admitted, that he (*Motte*) was at the time of paſſing the acts of confiſcation a citizen and inhabitant of *South Carolina*, a friend to the United States, and an aſſertor of their independence, and inimical to the ſovereignty of *Great Britain:* but with regard to *Thomas Smith*, the only co-executor then living, is well convinced, he ardently wiſhed for the tranquillity and happineſs of his country; and yielded to all her laws due obedience; yet was no friend to independence; nor wiſhed for a ſeparation. He ſtated, that no ſum was ever claimed, or paid under the acts of confiſcation. The defendant upon the 21ſt of *February* 1783 tranſmitted to the Commiſſioners of forfeited eſtates a ſtatement of his demand; and petitioned the Houſe of Repreſentatives in *Georgia* to provide for it: but that was wholly diſregarded. He believes, the only payment made in ſatisfaction of any ſuch claims by *Georgia* was by certificates payable in ſeven years; which were at a conſiderable diſcount in *Carolina*. He believes, no other proviſion was made for them; and no farther proviſion can be made by that ſtate for them; and inſiſts, that payment by ſuch certificates cannot be conſidered a ſatisfaction within the fourth article of the Treaty of

Peace. He farther ſtated, that the bonds were the property of minors.

By depoſitions it appeared, that *Charles Pinkney*, executor of a creditor of Sir *James Wright*, made application in *September* 1783 to the Board of Claims upon the forfeited eſtates in *Georgia*; which was refuſed, on the ground, that *Pinkney* had taken part with the *Britiſh*; to whoſe laws they were referred for recovery (*a*). There was alſo evidence, that by the laws of *Georgia* the paper money of the ſtate was a legal tender; that ſome creditors recovered out of the confiſcated property; and that Sir *James Wright* took away ſome property, but the amount was uncertain: General *M'Intoſh*, the preſident of the Board of Claims on the forfeited eſtates in *Georgia*, ſtated, that no application was made by *Motte* to the Board for his demand; that the Board did allow ſome claims to citizens of *Georgia* againſt the eſtate of Sir *James Wright*: but ſome claims from other ſtates were referred to his eſtate in *England* for recovery; becauſe he had carried away with him from *Georgia* the whole or the greateſt part of his perſonal eſtate and moveable effects to an immenſe value; and left nothing but his lands in *Georgia*; which were confiſcated and ſold. He alſo ſtated, that the certificates were at a great diſcount.

Mr. Richards and Mr. Fonblanque for the plaintiffs—The caſe of the plaintiffs reſts upon the arguments in *Wright* v. *Nutt*. The creditors of Sir *James Wright* might under theſe acts of Aſſembly have applied to the ſtate of *Georgia* for payment; which he, attainted and rendered incapable of ſuing, could not. All his property was within their reach; and if he had paid them out of his own pocket, they could not have aſſigned to him their right to go againſt his property in *America*. The Commiſſioners in this country in their eſtimation of his loſs took into their conſideration the proviſion made for his debts in *America*. The compenſation he received here formed a fund, in reſpect of which the *American* creditors afterwards thought fit to ſue. An Injunction was granted upon the ground, that the creditor either had, or might have, been paid in *America*; and the Injunction was continued to the hearing, after *Motte*'s anſwer came in. The acts of confiſcation

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(*a*) See 3 *Bro. C. C.* 331.

left the property open to every creditor, who was a friend to independence. *Motte* was of that deſcription. He was bound to uſe due diligence. If he had, he might have been paid there; and whether he has, or not, if he might, the plaintiffs ought to be diſcharged. Can he, having neglected to follow the property, put within his reach excluſively, and out of the debtor's, purſue that debtor afterwards? This does not break in upon the general rule, that debts follow the perſon. Lord *Kenyon* concurred with Lord *Thurlow* upon this. After *Pinkney*'s anſwer came in, it ſtated ſo fully, that he had made every attempt in his power without effect, that the Lord Chancellor ordered the money to be paid to *Nutt* upon giving ſecurity to repay it, if the decree ſhould be againſt him. That circumſtance ſtrongly marks Lord *Thurlow*'s opinion. In the ordinary caſe if the equity is denied, the Judge has no right to reſtrain the action: but in this inſtance giving credit to the anſwer in a certain degree the Court would not permit the money to go without a perſonal ſecurity from *Nutt* to reſtore it in that caſe; leaſt it ſhould go to *Pinkney* in *America*, from whom it could not be recovered. Lord *Loughborough* alſo in *Folliott* v. *Ogden* (*a*) expreſſes his perfect coincidence with the doctrine of *Wright* v. *Nutt*. Again, upon the motion to diſſolve the injunction in this cauſe, after *Motte*'s anſwer came in, Lord *Loughborough* ſaid, where a creditor has two funds, he ſhall not make an oppreſſive uſe of his power againſt one; where he cannot give the debtor the benefit of the other; obſerving, that this was more than neglect; it was oppreſſive in the creditor, and with a view to oppreſſion; and upon that ground the injunction was continued to the hearing. Upon theſe authorities, expreſs deciſions upon the very point, theſe plaintiffs are entitled to protection; unleſs the creditor uſed due diligence; and upon the facts it appears he did not; and your Lordſhip will prevent oppreſſion by ſuing now, when he might have had payment twenty years ago. Rules of law cannot meet every combination of circumſtances: but the equitable juriſdiction is more enlarged; proceeding upon principles of univerſal juſtice; which muſt not be defeated by ſlight obſtacles; as in the caſes, in which equity has interpoſed in reſpect of public policy or public juſtice. Formerly Courts of Law would not advert to ſuch conſiderations: of late they

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(*a*) 1 *Hen. Black.* 123. 3 *Term Rep. B. R.* 726.

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they have made ſome progreſs in that way: but they have not gone the length of Courts of Equity. The Legiſlature have gone ſome way to prevent the ſale of offices (*a*); but ſtill it is neceſſary in ſome caſes to come here; as in *Law* v. *Law* (*b*); *Harrington* v. *Duchatel* (*c*); upon conſiderations of public policy, which, though they cannot influence a Court of Law, impoſe a duty, and create a right. Can there be a higher conſideration, than that, which encourages the loyalty of the people of this country? The proof is thrown upon the creditor, that he has done all in his power to make his demand available by a fund diſtinctly provided for him. It is not contended, that the juriſdiction of this Court extends to enforcing the obſervance of every moral duty: but though this ſubject is anomalous in its circumſtances, the equity is not new in its principle. The judgment in *Wright* v. *Nutt* diſplays the principle of the rule; and clearly eſtabliſhes, that it ought to prevail in a Court of conſcience. It may be objected, that this Court cannot interpoſe againſt a legal right: but the maxim, "*Sic utere tuo ut alienum non lædas*," is not only a maxim of law, but a principle of equity. Before the rule as to marſhalling aſſets prevailed, the practice was to reſtrain a judgment creditor by injunction from going firſt againſt the perſonal eſtate: *Mills* v. *Eden* (*d*). The principle of equity is ſo ſtrong, that it applies even againſt the prerogative: *Sagitary* v. *Hyde* (*e*). *Perey* v. *Marſh* (*f*). *Lanoy* v. *The Duke of Athol* (*g*). So, where a creditor having an intereſt to get priority at law, a decree is obtained by another creditor: there this Court interpoſes againſt the legal right; and ſubjects it to conſiderable inconvenience. The caſe of a man making over his property for the payment of his debts is very different. That is his own act. With reſpect to *M'Donald*'s caſe (*h*), and *Holditch* v. *Miſt* (*i*), it would be ſtrange, if, becauſe a man had committed a felony, he ſhould be protected from a civil right; that privilege ſhould grow out of delinquency. *Holditch* v *Miſt* was a caſe of fraud. Formerly a bankrupt was regarded in that light. Is that the caſe of Sir *James Wright*? If he had gone back to *Georgia*, he would have been attainted of high treaſon: but in this country it muſt

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(*a*) Stat. 5. and 6. *Edw*. 6. *c*. 16.
(*b*) *For*. 140. 3 *P. Will*. 391.
(*c*) 1 *Bro. C. C.* 124.
(*d*) 10 *Mod*. 487.
(*e*) 1 *Vern*. 455.
(*f*) 2 *Vern*. 182.
(*g*) 2 *Atk*. 444.
(*h*) *Foſt*. 59.
(*i*) 1 *P. Will*. 695.

be remembered, that his only crime was his loyalty and allegiance. His diſability was not merely in reſpect of the property withdrawn. The recompence for the purpoſe of paying this debt would have been forfeited. It will be ſaid, the creditor would have been paid in depretiated money; and that ought to weigh now. But, might not the debtor, if not deprived of his property, have diſcharged the debt there in ſuch depretiated paper; which is proved to have been a legal tender? A man acting with common good intentions would have attempted to make his demand available, as far as he could; giving his debtor to underſtand, that he muſt not be prejudiced by it. They ſhew an application; but not, that they followed it up; and took the courſe preſcribed. They ought at leaſt to have gone as far as they could without incurring expence. This is an attempt, as Lord *Loughborough* expreſſed it, to increaſe the effect of confiſcation. A deduction was made in the allowance from this country in reſpect of the debts to be paid out of this fund. Till 1791, when that fund, which is ſo reduced upon the ſuppoſition, that theſe debts were paid out of the fund in *America*, was provided by the bounty of Parliament, the action was not brought.

The Solicitor General, Mr. Manſfield, and Mr. Stanley, for the defendants—This creditor could not be for ever debarred from his legal demand, becauſe he did not make his election in one year. The act of Aſſembly was a bar only to an application againſt the confiſcated eſtates, not, as it is contended, to any other demand againſt the debtor. The evidence does not ſtate, that theſe certificates were a legal tender; but they were merely made receivable in payment of the purchaſes of the forfeited eſtates. The proof lies upon the plaintiffs. There is no ſuch principle of equity as is now ſet up: nor did this caſe ever furniſh the facts, to which it would apply; and if it ever did, it does not at the preſent moment. If this fund was, as it is ſuppoſed by the argument, money in the next room, and the creditor wilfully, maliciouſly, and oppreſſively, would not take it, but would proceed againſt the debtor, the caſe would be very different. Nothing like that is in evidence. Surely ſome time is neceſſary for an executor to conſider, what would be the effect of taking

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this depretiated paper in payment under this act. He could not, if he had taken it, afterwards go againſt the debtor, becauſe the paper fell. *Arnold* v. *Holker* (*a*) ſeems to the contrary: but it does not appear, upon what principle; for according to that law it would have been a legal payment. Suppoſe, the paper inſtead of falling had riſen; the ſurplus could not have been claimed by the debtor. The caſes put by your Lordſhip (*b*) would fall within the principle; if it was recognized as a principle of this Court. In the caſe of a bankrupt before Certificate, or, putting it more ſtrongly, before Certificates were known, might not the creditor refuſe to come in, and purſue him at law? Will not this Court permit him to come in for the expreſs purpoſe of defeating the Certificate? Where a bill was put into the hands of a bankrupt before his bankruptcy without indorſement, and diſcounted, it was held, that either an action of trover might be brought, conſidering it as a tort, or an action for money had and received; and in the former caſe it was no anſwer, that the bankrupt had obtained his Certificate. In the caſe of a perſon attainted ſuppoſe a pardon by act of Parliament, reſerving the forfeiture: he may be charged in execution.

The caſes of marſhalling aſſets, &c. do not apply. All that arrangement is for the benefit, not of the debtor, but the creditor. In the caſe of bankruptcy the creditor is permitted to elect, whether he will come in under the Commiſſion, or not; and he would not even be put to his election, if there was any reaſonable doubt, which was for his advantage. Certainly a bankrupt is not now treated upon the old principle of fraud. Conſidering this as a pledge it would be ſtrange, that it ſhould be forced upon the creditor. Can the debtor take advantage of this act, by a country not his own, and not intended for his benefit? *Holditch* v. *Miſt* is in point; and the fact in that caſe, that the fund was in the ſame country, brought it much nearer the principle. In *Hornby* v. *Houlditch* (*c*) Lord *Hardwicke* recogniſes that caſe. Why may not this creditor avail himſelf of two re-

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(*a*) In the Court of Exchequer.

(*b*) The obſervations, that fell from the Court during the argument, are ſtated more at large in the judgment.

(*c*) *Amb.* 40. 1 *Term Rep. B. R.* 92.

medies? A mortgagee has ſeveral. He has a right to chooſe for himſelf. At leaſt it ſhould be clearly made out, that they had called upon him, and had undertaken to bear all the conſequences, if the application ſhould prove fruitleſs. It is not proved, that the repreſentatives of *Smith* at the time were friends to *American* independence. The anſwer ſays, *Smith* never was friendly to it; which is alſo confirmed by Sir *James Wright*'s letters; and there is no proof to the contrary. *McIntoſh*'s evidence is, that ſome claims by perſons reſident out of *Georgia* were referred to Sir *James Wright*'s eſtate in *England*; becauſe he had carried away great perſonal property, and left nothing but his lands. They muſt therefore firſt eſtabliſh, that this claim could have been made available. Your Lordſhip obſerved, that the ſtrong ground is, that the creditor is to be conſidered a ſubject of the country, and a party to the act. That would apply equally to *Holditch* v. *Miſt*. But this caſe does not ſupply that fact. *Smith*, the creditor, was an inhabitant of *Carolina*. The different ſtates are for the purpoſe of Legiſlation diſtinct. The greateſt hardſhip might follow to the family of this creditor from ſuch an injunction. Are the *Ceſtuis que truſt* to be barred, as well as the truſtee, becauſe in one year he has not taken this particular mode and novel proceſs? Is he to be conſidered upon the principle of a *devaſtavit?* It muſt be carried to that extent: or how are the *Ceſtuy que truſts* to be protected? There can be no doubt, that, if he could have obtained payment, he would. This proviſion is confined to friends to *American* independence. As to the mode, not a ſhilling was to be paid in caſh. There is no evidence, that Sir *James Wright* had not the means of paying this or any other debt. Hardſhip, though certainly entitled to ſome conſideration, is not alone a ground for relief. In *Kempe* v. *Antill* (*a*) Lord *Thurlow* appears to have entertained a very different opinion from that, which he afterwards adopted.

Mr. Richards in reply—This Equity is certainly new in ſpecie: but the principle is not new. In *Kempe* v. *Antill* Lord *Thurlow* ſeems of opinion, that, if the creditor had the fund in his own

hands,

(*a*) 2 *Bro. C. C.* 11.

hands, he ſhould be injoined. This is not the caſe of two ſubjects of the ſame country, though originally ſo. Though the creditor died before the Rebellion, *Motte*, who now ſues, admits, that he was friendly to it; and what he ſays as to *Smith* is only, that he was of a quiet turn, and diſpoſed to yield to the prevailing power. *Motte*, a member of an *American* ſtate, though not of *Georgia*, joined in this act; admitting himſelf a party, an active member in that treaſon and rebellion. Though the ſtates are diſtinct, yet they are members of the ſame great ſtate; like different juriſdictions in this country. By the rebellion the contract certainly became different as between the parties. The alteration was not made by any act or conſent of the debtor, but by external force acting upon him, and with the aſſiſtance of every member of that ſtate. No caſe has been ſtated, in which by the act of the ſtate, of which the defendant was a member, the contract has been varied. The caſes of marſhalling are applicable to ſhew, that a Court of Equity does act upon a principle injurious to the creditor for the ſake of doing juſtice to all. What right has the Court in that inſtance to leſſen the ſecurity, or vary the nature of the contract; to make the obligee wait till the value of the real eſtate is ſeen? There is no principle, that will not equally apply to this caſe. The Court in theſe caſes drives the creditor from a fund, to which he chooſes to go, and to which he was entitled by his contract to go, to another, to which he does not wiſh to go, for the ſake of doing more general and ample juſtice.

With reſpect to the caſes in bankruptcy, they are really within the principle, for which we contend. They are legiſlative declarations in favour of it. The inſtant it appears, that the debtor acts fairly he gets his Certificate; and then is he not diſcharged? All the previous ſteps, putting him in priſon, election, &c. are only to attain the object of the legiſlature, the application of his property to his debts. The principle is, that the legiſlature taking from him all the means of paying his debts protects him. It does not follow, that if *Motte* does not ſucceed here, he will be charged with a devaſtavit. It is not neceſſary for the plaintiff to conſider that. It is the conſequence of his own act. I deny, that under the particular circumſtances of this caſe the debt follows the perſon: the nature of the contract being altered by the acts, to which *Motte* as a member of that ſtate, which procured the property to be confiſcated, was a party; receiving as ſuch the advantage derived from the confiſcation.

Holditch v. *Miſt*, if not capable of being diſtinguiſhed, was overruled by *Wright* v. *Nutt*. But it may be diſtinguiſhed. *Holditch* was a member of this community; certainly a party to the Act of Parliament, paſſed for the purpoſe of doing juſtice to the objects of the South Sea bubble; and that caſe, it muſt be remembered, was decided at a time, when the paſſions of the country were very much inflamed by the circumſtances of that affair. If a perſon places all his property in the hands of truſtees, that is his own act; and he knows the conſequence. Certainly therefore that will not protect him. With reſpect to the caſe of a perſon attainted, the law attending the contract is ſuppoſed to make part of it. The law of the land is, that the attainder ſhall not free him from his debts. Beſides, the property being forfeited to the Crown, the creditor has no fund to go to. But in this inſtance the property is made amenable to the debt. Then as to the caſe of the bill of exchange, put by your Lordſhip, the nature of the contract is, that, the acceptor being a bankrupt, the holder giving notice may go againſt the drawer; who comes upon the bankrupt's eſtate to the extent of the dividend. The nature of this contract has no reſemblance to that. Sir *James Wright* had no power to make his property available: but his creditors had that power. With reſpect to the caſe of the obligee and ſurety, that is the contract between the parties. The obligee is not bound to ſue the obligor. With reſpect to him by the nature of the contract both are principals. The ſurety has a right to go in ſome way againſt the obligor; if not upon the bond, becauſe it is paid, in an action for money had and received.

As to the neceſſity of making a requeſt, in the caſe of the ſurety the obligee is not bound to make a requeſt. But it was the duty of this creditor, involved in the act of the State, making the fund acceſſible to him, and depriving the debtor of it, to apply; and not having done ſo he is guilty of groſs oppreſſion. The plaintiffs are not anſwerable for the ſhortneſs of the time. They do not mean, that they had no notice; and it would be difficult to ſay, they had not: but they ſay, they ſent a memorial to the ſtate; which they never followed up. How was a baniſhed man to make an application during the flagrancy of rebellion? As to the property left, even *M'Intoſh* ſtates, that he left his eſtate and plantations. There was therefore property, which they never attempted to make available, and which we could not: the amount, I admit, is not aſcertained: but there is foundation for an inquiry as to that; and to what extent it might have been made available. *Motte* by his negligence may have ſuffered the opportunity to eſcape. The objection as to the certificates is ſtated very looſely. The act of Aſſembly provides for the payment within a year; and gives the purchaſers liberty to pay the certificates to the ſtate. Be the depretiation what it may, ſtill ſomething might have been procured from this eſtate.

The Lord Chancellor ſtated the caſe; and delivered his opinion.

This debt was contracted upon perſonal ſecurity; and the nature of the contract, if it does not neceſſarily imply, that the creditor did not mean to place himſelf in the circumſtances, which belong to the nature of a pledge, and I do not mean to inſinuate, that it does, admits, that he might have in his contemplation rather to accept a perſonal contract, and that only, than to entangle himſelf with any queſtions, in which he might be engaged, if in addition to the perſonal ſecurity he had conſtituted himſelf a creditor by a pledge, placed in his hands for a debt. It is admitted, theſe bonds were given for money actually advanced. It is alſo admitted by the proceeding in this Court, that in law notwithſtanding the alteration of circumſtances the debt is legally due by the contract; and this bill inſiſts, that there is in the circumſtances and facts, connected with the conduct of the defendants, as to what they have done, or might have done without wilful default, a ground for ſaying, a Court of Equity ought to cut down the admitted legal effect, yet ſubſiſting, of the legal perſonal contract. The creditor was a member of *Carolina*, not of *Georgia*; and, as far as there is any evidence as to his temper with regard to this country or that, it ſeems to import rather, that he was well affected to this country; though not very diſtinctly. One of the executors alſo upon the evidence, not very diſtinct as to that either, appears rather having an affection kind than hoſtile to this country. As to *Motte* the evidence is more diſtinct; repreſenting him well affected to *America*. It does not appear, how far the office of executor in this caſe carries with it the beneficial intereſt (*a*). If it does not, the queſtion is, how far ſhall the equity affect thoſe beneficially intereſted, if they were well affected to this country; regard being had to the circumſtance, that one executor was well affected, the other ill affected, to *America.* Such an hypothetical caſe muſt be looked to, before you can collect the law upon principles applying to ſuch caſes as theſe. No queſtion ariſes upon the firſt act of confiſcation: but Sir *James Wright* was again obliged to fly; and the property, which he had, and could not remove, (for there is evidence, and ſtrong evidence, that he did remove ſome) fell under the graſp of another act of confiſcation. Upon the policy of that act I make no obſervation. It gives to the creditors well affected to *America* the means of applying to the confiſcated property, as a fund for payment of their debts; and it muſt be admitted, the debtor himſelf was completely barred from all poſſibility of recourſe to that property; and that he neither had nor could acquire an intereſt in that fund ſo reſerved, in the mode, in which it was reſerved, for the payment of certain debts.

Upon this caſe, notwithſtanding all this argument, and an able argument, that *Motte* muſt be conſidered himſelf an author of that act, and that *Smith*, though, if it can be ſo put, with good affections to this country, and the *ceſtuis que truſt* alſo, are to be taken as the authors of it, yet it is clearly the law of this country, that their own act ſo expreſſed varies no one legal incident or quality of the contract. The relief muſt therefore be in equity only. With all deference I am diſpoſed to think it very difficult to maintain that equity; having infinite difficulty in reconciling my mind to this point; that the act of the individual, if bound up to the act of the ſtate, ſhall be conſidered bound up with it to equitable, but not to legal, principles; and that the contract ſhall be affected in one Court, and not in the other. I feel the more difficulty upon this, as neither Lord *Thurlow*, Lord *Kenyon*, nor Lord *Loughborough*, relied at all upon that way of putting the caſe. They put the doctrine upon different grounds certainly. This is a queſtion of great importance; and if I found myſelf bound to de-

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(*a*) In anſwer to a queſtion from the Lord Chancellor upon this it was ſaid at the Bar, that *Motte*, who had married a daughter of *Smith*, had ſome intereſt under the will; but was alſo a truſtee for others.

cide this cauſe, not upon the facts, but upon the principle laid down in the authorities, to which I am referred, admitting, the facts formed a ground for the application of that principle, I ſhould have been obliged to expreſs a different opinion from all thoſe authorities, much as I reſpect them. I ſhould certainly have thought it my duty to conſider the caſe very much, before I ſhould have permitted myſelf to expreſs that contradiction of authority; the more peculiarly, as it was not till this argument that I could ſuggeſt ſome colour of anſwer to the difficulties, that my mind preſented to itſelf.

Upon this queſtion Lord *Thurlow*, Lord *Kenyon*, and Lord *Loughborough*, the laſt certainly extra-judicially, but in a caſe, upon which his conſideration was much intereſted, and therefore carrying as much authority as under any circumſtances an extra-judicial opinion can, proceeded upon principles, that are ſtated very diſtinctly and very anxiouſly in this Report (*a*). It appears by Lord *Thurlow*'s judgment, that the attention of the Legiſlature had been called to the ſituation of theſe parties; and propoſitions had been made upon it in Parliament. Lord *Thurlow*'s opinion was, and certainly that is very correct, that, let ſuch events happen, as might, influencing or deſtroying the means of the debtor to make good the contract, if the duties, which ariſe out of it, formed a legal and natural right of the creditor to ſue the debtor under thoſe circumſtances, nothing could be more delicate than the interference of the Legiſlature, taking away from motives of compaſſion thoſe ſtipulated rights, into which the debtor thought fit to enter. That led Lord *Thurlow* to form an opinion upon the right of the creditor very favourable to the debtor; and ſatisfied him not only, that it was too delicate to be meddled with, if it was neceſſary, but that, as it was not neceſſary, it was the more unfit to take that courſe. That idea was therefore dropped; and a bill was filed.

In this Report it is laid down as Lord *Thurlow*'s clear opinion (*b*) that the principle is, "that, provided a caſe is made, by "which it appears, that there is in the hands of a creditor either "poſſeſſion of the eſtate in fact, or the clear means of effecting

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(*a*) 1 *Hen. Black.* 136.

(*b*) 1 *Hen. Black.* 151, 152, 153.

"that poſſeſſion, he ought to be called on ſo to do, or at leaſt "the Court ſhould interpoſe."

If there is no riſk, no delay neceſſary to recover poſſeſſion of the fund, if no expence is neceſſary, no intermediate riſk of loſing, while you are looking to one fund, another, which is anſwerable, as in many inſtances, that is one ſort of caſe; and you are paid without prejudice. With regard to the laſt part of that propoſition I am ready to ſay, that if it is to be taken as between the creditor and the debtor only, that if the creditor has the clear means of effecting the poſſeſſion, he ought to be called on ſo to do, or at leaſt the Court ſhould interpoſe, the equity is new. I do not ſay, becauſe it is new in ſpecie, it is not therefore to be adminiſtered, if there are analogies from other caſes, out of which a principle may be extracted, ſufficient to ſupport that equity. The judgment is very correctly taken: but it is a little too ſhort in this part; for it drops a circumſtance, that is to be found in another part of the judgment, that the creditor has not the means of aſſigning to the debtor thoſe means he had of affecting the property. Lord *Thurlow* then ſays, as to *Holditch* v. *Miſt*, he does not profeſs to over-rule it: but profeſſing not to over-rule that caſe, unleſs the circumſtance, relied on by Mr. *Richards*, that the parties there were ſubjects of the ſame country, or other circumſtances diſtinguiſh it, I ſay, Lord *Thurlow* has over-ruled it. He ſays, he does not know how to apply that caſe to the caſe then under conſideration; but that he retains his opinion, that a creditor will be bound by an application to this Court to uſe fair *bonâ fide* diligence in order to make the moſt of his debtor's eſtate in the place, where the law of the country has applied that eſtate to the payment of his debts.

Here alſo Lord *Thurlow* does not notice the circumſtance, that no aſſignment could be made; nor attend to a circumſtance, deſerving ſome attention, as connecting itſelf with the inference from all the caſes of non-application of the creditor to a pledge, taken even in the original conſtitution of the contract, or another ſurety: the caſes ſtating a diſtinction between not acting, where no requeſt has been made, and a refuſal to act, where there has been a requeſt.

Lord *Thurlow* then ſtating the circumſtances, under which that application was made, proceeds, that "in order to make a "good and effectual bar in equity to a demand at law, it will be "neceſſary to ſhew, that the eſtate of Sir *James Wright* confiſcated in *America* was of greater value, not only than the ſum "now in queſtion, but than all ſums claimed upon that eſtate; "conſequently, that there was a fund ſufficient to have paid the "whole; for if it ſhould turn out to be a defective fund, and capable of ſatisfying the debt but in part, it can only operate as "a diſcharge *pro tanto*."

Upon the obvious meaning of the language of this part of the judgment, the *onus probandi* is thrown upon Sir *James Wright.* I do not ſay, that in other parts it is not put upon the other parties: but I doubt, whether the language of every part is conſiſtent upon the point, on whom the proof lies. The paſſage immediately following ſtates, that in the ſecond place it muſt be ſhewn, that by the juſtice to be obtained in that country, this demand was competently made. There the language throws the proof upon the others. With the next paſſage that the Courts of that country muſt be ſuppoſed to be deciding according to the laws of that country, I agree to this extent; that natural law requires the Courts of this country to give credit to thoſe of another for the inclination and power to do juſtice; but not, if that preſumption is proved to be ill founded in that tranſaction, which is the ſubject of it; and if it appears in evidence, that perſons ſuing under ſimilar circumſtances neither had met, nor could meet, with juſtice, that fact cannot be immaterial as an anſwer to the preſumption, when we are dealing with ſuch an equity as this. So, underſtanding them to be deciding according to the laws of that country, I ſhould ſay under this Act, if this clauſe means, they ſhould let in all debts, I muſt ſuppoſe, they would let in thoſe from *Carolina*, as well as *Georgia*. But if the contrary is proved, the principle obliges me to ſuppoſe, their deciſion upon that is right; and that is the true interpretation of the law, which they themſelves put upon it.

Preſumption, that the Courts of foreign countries decide according to law; but open to evidence.

Lord *Thurlow* proceeds, that "therefore if a formal and final "deciſion had been obtained, by which it became impoſſible to "have obtained a ſhilling of the whole of that demand, that "would likewiſe be a ſufficient anſwer; for the bill proceeds "upon the idea, that the fund was complete; and that it is ſtill "available; or, if not ſo, that it has been owing to the conduct "of the other party."

I do not heſitate to declare, that it is not neceſſary, that a formal demand ſhould be made in the individual caſe; provided it is proved from what has been done in other caſes, that the demand would have been uſeleſs.

Theſe are the principles, coupled with the circumſtance, that the creditor cannot aſſign the benefit of the fund to the debtor, that led Lord *Thurlow*, Lord *Kenyon*, and Lord *Loughborough*, to this deciſion. This is great authority; not only from the conſideration given to it, but, as it was followed up by great conſideration afterwards, and adhered to; and there is the cleareſt concurrence of Lord *Kenyon;* who, I admit, ſubſcribes fully to the whole doctrine; and there is the additional authority of Lord *Loughborough* in *Folliott* v. *Ogden;* declaring his full and abſolute concurrence in this doctrine. There is alſo Lord *Thurlow*'s act ſubſequent, ſtating his mind as impreſſed with the verity of this doctrine to a great extent; and I think, he has carried the principle farther than his own doctrine would require; for when *Wright* v. *Nutt* came finally before the Court, when it was found neceſſary to deliver the fund to *Nutt*, I can ſee no ground requiring him to give ſecurity. Suppoſing the doctrine correct, that was preſſing it beyond the principle.

It is impoſſible to deny, that I argued that caſe with a full perſuaſion in my own mind, that the caſe was in ſpecie perfectly new; and that there was difficulty in finding a principle quite ſatisfactory to ſupport the equity. The firſt difficulty is this. Is it the law, that under ſuch circumſtances the perſonal liability of the debtor is taken away. That is not contended. It muſt be founded upon the law of nations, I preſume. Is it the law, that under ſuch circumſtances the remedies reſulting out of that liability ſhall be reſtrained by confining the remedies to particular funds, or by confining them altogether as to the perſon, till the creditor

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creditor has had recourſe, not to all the funds of the debtor, but to ſome of his funds, which funds in the original conſtitution of the debt, and the tranſaction, forming the relation of debtor and creditor, the debtor did not propoſe, nor the creditor receive, as the funds to be charged by the contract with that debt. Suppoſe, *Smith*, adverting to the circumſtances of that day, a probable revolution, or at leaſt troubles in *America*, had ſaid, he would have nothing to do with the eſtate; but had ſo good an opinion of Sir *James Wright*'s perſonal reſponſibility, that he would take a perſonal contract; knowing, he had property here and in other countries; and that reſponſibility would go with him, wherever he went: ſuppoſe him to ſtipulate expreſsly, that he ſhall not be implicated in the juſtice of the ſtate, but ſhall have merely a perſonal contract. The very circumſtance of the neceſſity of giving notice with reſpect to a bankrupt acceptor, the reaſoning requiring that, is of this ſort: it is not upon grounds of malice, oppreſſion, *&c.*; but, that you have no right to judge for the drawer what he can make out of the impriſonment of the acceptor, operating by way of dureſs upon the feelings and affections of third perſons. This is the effect of the contract they actually made. Then why ſhould not the terms and effect of the contract determine their meaning rather than conjecture. This is ſaid to be oppreſſion, wilful wrong and injury. What right is there to apply theſe terms to the effect of the contract? The maxim "*Sic utere tuo ut alienum non lædas*," is mentioned. That aſſumes the queſtion; which is, what is *ſuum*, what, *alienum*. The right to ſue is conceded. Then how is it to be taken away without the conſent of the creditor?

Conſider it as the caſe of a pledge. If originally a pledge was given in the terms of the contract, if the true effect is, that the creditor ſhould have all the remedies belonging to the nature of a pledge, and alſo perſonal reſponſibility, following the perſon every where, it is queſtionable at leaſt, and a great deal of argument would be required to make out, that the Revolution would have operated to drive the creditor to the pledge, and to compel him to give up the other remedy at the inſtance of the debtor. But the difficulty is much enhanced, when the pledge is not given to the creditor by the terms of the contract, but is thrown to him by an act, not his own; unleſs it is ſo upon the ground of his preſumed conſent as a member of the State; to the difficulty of which I have before alluded. If it is not to be conſidered his own, and by the terms of the contract he has the perſonal reſponſibility, what right has the debtor to ſay, he ſhall take the pledge; and with this effect, that, till he has endeavoured to make the moſt of it under circumſtances more or leſs favourable as to the reſult, he is, not to give up the perſonal reſponſibility, but to ſuſpend all the fruits to follow from it. There is great difficulty in that; and if the principle is right, it eſtabliſhes the equity, though the pledge cannot be conſidered originally contracted for, or ſubſequently taken with the conſent of the creditor; for there is no ſuch qualification upon their principle; which muſt be right without that circumſtance, ſo much inſiſted on in the argument for the plaintiffs upon the doctrine in the caſe, to which I am alluding.

I am not ſure, that the caſe of bankruptcy does admit an anſwer. I am unneceſſarily going into the caſe; as I ſhall decide it upon the facts. The caſe of bankruptcy had ſtruck me as furniſhing conſiderable difficulty; and I cannot get rid of it upon the ground of delinquency. The law, to which every creditor is a party, (which affords an anſwer to the plaintiffs' argument, except ſo far as there may be a diſtinction upon the circumſtance, that the individuals are of different countries) veſts the whole of the bankrupt's property in the aſſignees; and leaves it purely to the creditors, whether his future effects ſhall not alſo be brought within the reach of the effect of the aſſignment. Formerly, when the creditors could not give a certificate, even the opportunity of getting a diſcharge was taken away. Yet under thoſe circumſtances the creditor was allowed to lay hold of the perſon of the debtor, in order to ſqueeze from third perſons the means of getting his debt. But this anſwer to that caſe ſtrikes me; that the circumſtance, that the creditor cannot aſſign the fund, does not belong to it: or if it does, then you raiſe a caſe, in which the debtor has no right to complain. Suppoſe the bankrupt has ten creditors: nine come in under the Commiſſion; and one refuſing to come in arreſts him: if his eſtate is equal to paying 20*s.* in the pound to all, what would have gone to the tenth goes to the bankrupt as ſurplus, which operates as an aſſignment to the bankrupt of that portion. If the effects are not ſufficient to pay all, then the bankrupt has no right to complain; for he cannot find an equity againſt one creditor not going in, if the fund has been applied in diſcharging the debts of other creditors.

A ſurety may be ſued in the firſt inſtance: but if the creditor ſues the principal firſt, and gives time, the ſurety is diſcharged.

As to the caſe of principal and ſurety, in general caſes I never underſtood, that as between the obligee and the ſurety there was an obligation of active diligence againſt the principal. If the obligee begins to ſue the principal, and afterwards gives time, there the ſurety has the benefit of it (*a*). But the ſurety is a guarantee; and it is his buſineſs to ſee, whether the principal pays, and not that of the creditor. The holder of the ſecurity therefore in general caſes may lay hold of the ſurety; and till very lately even in circumſtances, under which the ſurety would not have had the ſame benefit, that the creditor would have had. But in late caſes, provided there was no riſk, delay, or expence, as in the caſe put, of the money in the next room, indemnifying againſt the conſequences of riſk, delay and expence, the ſurety has a right to call upon the creditor to do the moſt he can for his benefit; and the latter caſes have gone farther. It is now clear, that if the ſurety depoſits the money, and agrees, that the creditor ſhall be at no expence, he may compel the creditor to prove under a Commiſſion of Bankruptcy, and give the benefit of an aſſignment in that way (*b*). That caſe therefore perhaps does not bear much upon it.

Surety, depoſiting the money and indemnifying againſt expence, &c. may compel the creditor to go againſt the principal, and even to prove under a Commiſſion of Bankruptcy for the benefit of the ſurety.

The holder of a bill of exchange may be compelled to prove under the bankruptcy of the acceptor for the benefit of the drawer.

So the caſe of a bankrupt acceptor, and the holder and drawer, of a bill would admit the ſame anſwer as the caſe of the bankrupt; for the holder may be compelled to prove for the benefit of the drawer: if not, the drawer ſues upon a contract, the terms of which flow out of the original contract, of the benefit of which he could not be deprived under thoſe circumſtances.

A perſon attainted may be charged in execution.
ſee poſt. 61.

Upon the caſe of the attaint the contract is taken to mean, that if the party becomes civilly dead for his crime, and that takes away all his property by forfeiture, yet the law implies out of that contract, that the creditor can charge his perſon in execution; and

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(*a*) *Rees* v. *Berrington*, *ante*, vol. 2. 540.

(*b*) See *Beardmore* v. *Cruttenden*, 2 *Cooke*'s Bank. Law, 211.

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even in circumſtances, from which there is no ray of hope of getting any thing by it, the creditor has a right to take his chance of that. A caſe, that was put in the argument deſerves attention. Suppoſe a pardon by Act of Parliament, reſerving the benefit of the forfeiture: the creditor a party to that; and conſenting to the forfeiture therefore: the debtor muſt remain in gaol. The Court has no right to apply the terms "wilful, malicious and oppreſſive," to what the law under thoſe circumſtances allows. But it may be objected, that the fund is not a fund for the payment of the debt. But put the caſe, as in ordinary caſes, that the Crown would pay the debt; and the creditor ſhould refuſe to go to that fund, and ſhould inſiſt upon his right to impriſon the debtor. The right to go to the Crown is not a legal right; which could be inſiſted on. It is too thin a claim, of imperfect and ſecondary obligation; and it would be impoſſible therefore to diſcharge the debtor.

But the point is decided, if *Holditch* v. *Miſt* ſtands. That caſe is directly in point. Can it be ſaid, the Legiſlature intended to make a proviſion for the creditors, not requiring them to come in as againſt that proviſion; and that they ſhould retain the power of ſuing the debtor perſonally? There was an abſence of intention. Their inclination would rather have been to take away that power: but without adverting to that they did leave it. There was a creditor in poſſeſſion of all the rights Lord *Thurlow*, Lord *Kenyon*, and Lord *Loughborough*, allude to, except the circumſtance of not being able to aſſign the fund, and he refuſes to go in; and proceeds perſonally. This Court then ſaid, it was the natural, legal, genuine, fruit of the contract: and what equity was there, independent of the incapacity to aſſign the fund? That caſe is an authority directly in point; and I muſt know ſatisfactorily, why it ſhould be overruled.

The next conſideration is, whether the want of power to aſſign the fund makes the whole difference: or the diſtinction, alluded to this day, connected with that? As to the firſt, I have ſtrong doubt, whether I can attach ſuch an equity, ariſing out of the circumſtance, that a fund was prepared without the conſent of the creditor (otherwiſe than by the act of the ſtate, to which he belongs, which is diſpoſed of by the very ſtate of this caſe,) that under the diſadvantage of having no fund pledged he ſhall be put under all the diſadvantage, that would have followed from his ſeeking originally to have a pledge. The caſes cited of double ſecurities, marſhalling aſſets, *&c.*, are not wholly inapplicable; in which this equity has been adminiſtered, not at the ſuit of the debtor, but certainly ariſing out of his acts; and he does indirectly receive benefit. But I doubt, whether they go the whole length of this; and the principle obviouſly was not relied on in thoſe judgments of Lord *Thurlow*, Lord *Kenyon*, and Lord *Loughborough*. In this caſe, if *Smith* had taken a note of hand, and had no other than perſonal ſecurity, is it clear, that, if an event happens afterwards, with reference to which it might be that he thought proper to take that very ſecurity, that equity attaches upon his conſcience to make him conſider the debtor anſwerable otherwiſe than according to the nature and circumſtances of the ſecurity? In many circumſtances he might have ſuffered ſeverely by taking that inſtead of a pledge. Then why in different circumſtances ſhould he not have the advantage?

If therefore my deciſion was to depend upon my acceſſion to theſe authorities, I am not prepared to ſay, I could agree to them. I am relieved in a great degree from the neceſſity of future conſideration with reſpect to this caſe; for I am of opinion, that, if the principles laid down in that judgment were clearly right, the facts of this caſe do not bring it within the reach of thoſe principles. They all concur, that the creditor muſt have the clear means, and it muſt be ſhewn, that he has the clear means, of making his demand effectual. Has this creditor had ſuch clear means? Firſt, as to the creditor himſelf, it is at leaſt not clear, that he was one of the well affected, that could have had recourſe to this fund. One of the executors appears to have been friendly to this country; the other adverſe. Next, it does not appear, whether the *Ceſtuys que truſt* were well or ill affected. But, whether they are, or not, am I to hold the creditor under this ſort of equity, certainly if ſubſtantial, thin: is the creditor under theſe circumſtances to have this decided at his riſk? Suppoſe, this debt was the only debt Sir *James Wright* owed; that he had money in this country to pay it, and no other fund except the money ariſing out of the confiſcated eſtate in *America*: are theſe creditors at their own riſk under all the circumſtances to ſeek to make the demand effectual out of the confiſcated eſtates; taking it alſo, that Sir *James Wright* was an expenſive man; and that theſe creditors had not a ſhilling but this debt, not only for their ſubſiſtence generally, but for the means of ſupport, while trying this queſtion in *America*, or for effectually trying the queſtion? Is there any juſtice in this equity, compelling them at ſuch hazard to apply to a fund, ſeized on by an act of confiſcation, interpreted by thoſe, who are to adminiſter it, and in fact applied, according to the evidence of *M'Intoſh*, to the debts of citizens of *Georgia*, and not of *Carolina* creditors: but, if applicable to debts generally, to be ſatiſfied by the Certificates, under a great depretiation? The creditors take that paper at their own riſk; and it is a grave queſtion notwithſtanding *Arnold* v. *Holker*, whether, if they take it without the conſent of their debtor, it would not be accepted at law in full ſatisfaction of the debt; and whether without proof, that any *Carolina* creditor did, or could, make his demand effectual, and where there is evidence, that the confiſcated property was made applicable only to the inhabitants of *Georgia*, and for the benefit of that ſtate, I am to ſay, there was wilful default in not making the claim; and, that, if made, it would have been effectual: a great deal more than is to be inferred from this evidence, if it can be called ſo; for the whole caſe is proved in a way, that leaves it without the character of evidence.

Therefore from this non-claim under ſuch peculiar circumſtances of riſk and difficulty, when it was no part of the original contract of the creditor, that he ſhould act, I cannot impute wilful default; ſo as to charge the creditor as a truſtee guilty of a breach of truſt in not claiming; and I ought to heſitate, unleſs better ſatisfied than I can be by this evidence, that, if the claim had been made, it would have been followed by conſequences as beneficial as are ſuppoſed. Without prejudice therefore to the queſtion of law, and without intending to have ſaid ſo much, but under an apprehenſion, that this cauſe may go farther, and that it may be uſeful, that all the difficulties, by which my mind is preſſed, may be made known, I am of opinion, that whatever may be done with a caſe clearly within the range and reach of that authority, this caſe is not within it; therefore the bill muſt be diſmiſſed. Under all the circumſtances, and particularly with reſpect to that authority, it would be infinitely too much to diſmiſs it with coſts.

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March 8.

HILL *v.* BINNEY.

The anſwer of an adminiſtrator to a creditor's bill, ſtating, that he believes, the debt is due, whether that is ſufficient foundation for a decree, *Quære.*

THE bill was filed by a creditor againſt an admini
by his anſwer ſtated, that he believed, the debt v

Mr. Fonblanque for the plaintiff expreſſed a doubt, whether that was a ſufficient foundation for a decree.

The Lord CHANCELLOR inclined to think it ſufficient: but Mr. *Richards* (*Amicus Curiæ*) ſuggeſting, that it was doubtful, Mr. *Fonblanque* conſented to exhibit an interrogatory.

March 10.

JERVIS *v.* WHITE.

Defendant ordered to pay money into Court before anſwer, in a caſe of groſs fraud, appearing upon affidavit by the plaintiff and by the defendant in anſwer.

THE object of this bill was to diſſolve the partnerſhip between the plaintiff and the defendant, and an Injunction againſt iſſuing ſecurities in the name of the partnerſhip. Before the anſwer came in, a motionwas made, that the defendant ſhould pay money into Court; upon affidavits by the plaintiff and by the defendant in anſwer, diſcloſing a caſe of groſs fraud upon the plaintiff, a young officer; who ſeeing an advertiſement in a newſpaper for a partner in a liquor-trade, repreſented as producing 7,000 *l.* a year, anſwered it; and was induced to pay 850 *l.* in caſh, to transfer ſtock, and to give a promiſory note; in all which he had advanced above 1,800 *l.* The whole turned out a mere bubble: the partnerſhip effects not exceeding the value of 150 *l.* The plaintiff had received back 267 *l.*; and 500 *l.* had been applied to the partnerſhip debts.

Mr. Romilly and Mr. Ainge for the defendant objected, that there was no inſtance of compelling the payment of money into Court before anſwer.

Mr. Manſfield, Mr. Lloyd, and Mr. Pemberton in ſupport of the motion, admitted that in the caſe of an account, where it was uncertain,

certain, whether there would be a balance; diſtinguiſhing this as a groſs fraud; and comparing it to the caſe of waſte, in which the Court interferes upon the ground of irreparable miſchief to ſecure the fund.

Lord Chancellor—I think, I am at liberty in this caſe to faſten upon the affidavit of the defendant in anſwer; as Lord *Kenyon* did in *Vann* v. *Barnet* (*a*); where though it was held, that in general in ſuch caſes the Court will not deal effectively between the parties, till the anſwer comes in, yet if the defendant anſwers the affidavits, the Court will look at the affidavit as if it was the anſwer. This is not a diſtinct admiſſion of a ſum of money in the defendant's hands: but upon the two affidavits, and the defendant's having undertaken to give an explanation, he is in the ſituation, in which an executor very often is. The defendant therefore muſt on or before the laſt Seal pay this money into Court, deducting what the plaintiff has received, and what he admits has been applied in the partnerſhip debts, ſubject to an application for the whole or any part to be applied in diſcharge of the partnerſhip debts, as the Court ſhall think proper.

I go this length upon the ground of groſs fraud. (*b*)

(*a*) 2 *Bro. C. C.* 158. (*b*) *Jervis* v. *White. Poſt.*

CURTIS *v.* PERRY.

March 8. 10.

Ships purchaſed by one partner held ſeparate property as between the creditors after his bankruptcy and the death of the other, upon the circumſtances; particularly the Regiſtry being made in the name of the one partner only; and being afterwards continued for purpoſe, that would have prevented any claim of the other: *viz.* a fraud upon an act of Parliament.

Henry Nantes and *Richard Muilman French Chiſwell* carried on buſineſs in *London* in partnerſhip as merchants, under the firm of *Richard Muilman* and Company. In 1796 *Nantes* purchaſed ſeveral ſhips; the ſales of which were duly regiſtered under the act of Parliament (*a*) as the ſole property of *Nantes*. On the 3d of *February* 1797 *Chiſwell* died; and on the 11th of the ſame month a Commiſſion of Bankruptcy iſſued againſt *Nantes*,

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(*a*) Stat. 26 *Geo.* 3. *c.* 60. *ſ.* 17.

as the ſurviving partner. The plaintiffs *Curtis* and *Clarke* had in 1796 ſupplied ſome of the ſhips, purchaſed by *Nantes*, with biſcuit; other plaintiffs had ſupplied other ſea ſtores; and ſome as ſhip builders had become creditors in reſpect of the ſhips.

Under an order made in the bankruptcy the plaintiffs proved their debts upon the ſeparate eſtate of *Nantes*: but a claim being ſet up by the joint creditors to the ſhips, as being the property of the partnerſhip, the bill was filed; praying, that they may be declared to be part of the ſeparate eſtate of *Nantes*, and applied in payment of the plaintiffs and the other ſeparate creditors.

The defendants, the aſſignees under the Commiſſion, by their anſwer admitting, that the contracts and engagements with reſpect to theſe ſhips were in the ſingle name of *Nantes*, ſtated that *Nantes* purchaſed the ſhips without the knowledge of his partner; and being deſirous of concealing the tranſaction from him regiſtered them in his own name; except one, which was regiſtered in the name of *Janſon*, a clerk of the partnerſhip; but that the purchaſe and outfit, though not entered in the books of the partnerſhip, were taken out of the partnerſhip funds. In *January* 1796 *Nantes* finding it impoſſible to conceal the tranſaction from his partner gave him a liſt of the ſhips, in which he was engaged; and in conſequence of ſuch diſcloſure the ſhips were brought into the partnerſhip account; and the diſburſements on that account were paid out of the partnerſhip money on the 13th and 14th of *January* 1796: but Mr. *Chiſwell* being a member of Parliament, and liable to penalties, if the ſhips were employed in the ſervice of Government, as ſome of them were, the regiſters were continued in the names, in which they had been regiſtered. The earnings of the ſhips were afterwards received by *Muilman* and Company; and placed to the account of the ſhips in the partnerſhip books; and the ſubſequent expences were paid by *Muilman* and Company, and placed to the debit of the ſame accounts. They alſo ſtated bills drawn on, and paid by, the partnerſhip in 1796 and the beginning of 1797, on account of ſupplies for the ſhips by ſome of the plaintiffs.

Evidence was produced by the plaintiffs, that *Nantes* acted as ſole owner; that he was made debtor for the proviſions ſupplied by the plaintiffs, *Curtis*, in 1796; that it is uſual to debit the owners, if their names are known; that the captains are ſometimes named; but generally not, where the owners are known.

For the defendants a clerk of the partnerſhip proved, that he gave all the orders for the ſhips to the tradeſmen in the name of *Muilman* and Company, as well prior to the 31ſt of *January* 1796 as afterwards. It was alſo proved, that all the ſhips were in the beginning of 1796 entered in the partnerſhip books as joint property, and always conſidered ſo from that time. Receipts given by ſome of the plaintiffs to the partnerſhip were alſo produced.

The plaintiffs' books were offered in evidence; containing entries, ſometimes making *Nantes* debtor; ſometimes the ſhips and owners, without names; ſometimes the ſhips and captains: but that evidence was rejected.

The Lord Chancellor directed an inquiry to be made at the Cuſtom Houſe, to ſee, who were conſidered the owners there: but it proved fruitleſs: the owners not being named in the entries or certificates granted; and no oath being neceſſary except in the inſtance of a bounty or drawback; and then it may be made by ſhippers of goods, agents, or clerks.

The Solicitor General, Mr. Richards, and Mr. Martin for the plaintiffs—The regiſter is concluſive as to the legal title. No difference ariſes from the circumſtance, that the poſſeſſion is in the defendants; which in ſubſtance will not be diſturbed: their poſſeſſion being referred to their reſpective titles, as aſſignees of the joint and ſeparate eſtates. If *Chiſwell* had claimed the property in theſe veſſels, this Court would not have interfered; nor any other. The anſwer would have been, that the poſſeſſion was for the purpoſe of a fraud upon an act of Parliament: in which caſe the maxim "*potior eſt conditio defendentis*" prevails at law and in this Court. That fortifies the objection from the regiſtry in the name of *Nantes* only. The ſame objection holds notwithſtanding *Chiſwell*'s death. It is impoſſible to inquire into this tranſaction without diſcovering the illegal purpoſe; to which the Court will give no aſſiſtance. Whatever therefore is by legal evidence proved to be the ſeparate property of *Nantes* muſt be conſidered

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ſidered and divided as ſuch. The oath, which muſt be made by all the proprietors, was made by *Nantes* only. This Court will make the ſame conſtruction upon the policy of the act; and will not raiſe a truſt in favour of a perſon, who within the intent of the act could not be the owner: *Hibbert* v. *Rolleſton* (*a*). The two claſſes of creditors having equal equities, the Court will not deprive either of the legal preference. *Chiſwell* not only did not comply with this act of Parliament, but did every thing to evade it for the purpoſe of defeating another act of Parliament, commonly called the Contractor's Bill. Since the caſe of *Rolleſton* v. *Hibbert* another act of Parliament (*b*) has been paſſed, to meet the doubts expreſſed in that caſe, whether parol contracts might be entered into; which would in this Court effectually bind the property. That cannot now exiſt. *Camden* v. *Anderſon* (*c*), in which Lord *Kenyon* alludes to the reaſon of Lord *Thurlow*'s decree in *Hibbert* v. *Rolleſton*, ſhews the ſtrict conſtruction put upon the act; for that was a caſe, not of fraud, but miſtake. A corrupt conſideration will not ſupport a contract or a truſt. The circumſtance of hardſhip is not ſufficient to prevail againſt theſe acts: *Weſterdell* v. *Dale* (*d*). The mere act of a partner drawing out more than his ſhare of the profits, and inveſting it in property, gives no lien.

Mr. Mansfield, Mr. Alexander, and Mr. Stanley, for the defendants—Upon the circumſtances theſe plaintiffs are not ſeparate creditors: if they are, they have no right againſt this, conſidered as joint property. There is evidence, that all orders for the repair and ſupplies of theſe ſhips were given in the name of the houſe. The act has left open this queſtion; and it was ſo conſidered by Mr. Juſtice *Buller* in *Rolleſton* v. *Hibbert*; whether there may not be an implied truſt by operation of law as to the ownerſhip, where the purchaſe was made with joint property; like a truſt by operation of law, notwithſtanding the Statute of Frauds (*e*); as if the ſhip had been purchaſed with the money of another. No miſchief intended to be provided for by the act can ariſe from this. If one partner chooſes to employ the partnerſhip fund in a certain branch of trade, there is certainly a ſtrong

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(*a*) 3 *Bro. C. C.* 571. 3 *Term Rep. B. R.* 406.
(*b*) Stat. 34 *Geo.* 3. *c.* 68. *ſ.* 14.
(*c*) 5 *Term Rep. B. R.* 709.
(*d*) 7 *Term Rep. B. R.* 306.
(*e*) 29 *Char.* 2. *c.* 3.

equity for the other to call on him to bring the whole into the partnerſhip. *Chiſwell* therefore, if living, might ſucceed upon the ground, that theſe ſhips were purchaſed with the partnerſhip fund. The argument from the contractor's bill might have been uſed, if *Chiſwell* had called for a ſhare of the profits; but has nothing to do with this queſtion: neither has the caſe cited; the principle of which is, that the party had taken a bill of ſale illegal within that act. How can theſe be conſidered as ſeparate creditors, upon the evidence, that the orders were given in the name of the partnerſhip, and the receipts given by theſe very plaintiffs to the partnerſhip, and bills drawn and paid by the partnerſhip on that account? With reſpect to the joint creditors the ſhips are joint property. They can know nothing of the regiſtry, *&c.* They give credit according to the apparent property of the houſe; part of which theſe ſhips were. In the bankruptcy of *Shakeſhaft*, *Stirrup*, and *Saliſbury*, it was decided, that wherever the property is in poſſeſſion at the bankruptcy, it ſhould be conſidered the property of the two, or the three, or the ſeparate property, or that of the houſe. So, if there is a debt due by one partner only, yet if it has been transferred into the partnerſhip debts, and the houſe has been in the habit of charging the partnerſhip with intereſt, ſo as to ſhew, that it was to be conſidered as due from the partnerſhip, and not from the ſeparate partner, in adminiſtering the affairs of the bankrutcy that ſhall be conſidered as due from all the partners. This is therefore to be determined upon the principles and rules uſually prevailing in bankruptcy. Analogous caſes may be put upon the ſtatute of *James* 1. (a). It does not follow, that, though the property belongs to one, they can conſider themſelves ſeparate creditors, when the intereſts of third perſons come in queſtion: the credit given being joint. The diſtribution ought to be among the joint creditors in reſpect of the viſible ownerſhip; the property upon the act of *James* 1. being joint, as between the two claſſes of creditors; with reference to whom the queſtion is very different from what it would have been between *Chiſwell* and *Nantes*. Can this Navigation Act repeal that ſtatute? The object was to aſcertain, who are the owners; while the ſhip is navigated as *Britiſh*. The policy of the act does not apply to the caſe of a bankruptcy; making an immediate ſale neceſſary; which muſt be to *Britiſh* ſubjects. The viſible owner within the act of King *James* is he, who does public acts with reſpect to the property.

(a) Stat. 21. *Jam.* 1. *c.* 19. *ſ.* 10, 11.

The Solicitor General in reply—One joint receipt produced is not on account of any of theſe ſhips; and there is no doubt, there were partnerſhip tranſactions. The anſwer admitting, that all the contracts and engagements were in the ſingle name of *Nantes*, as ſole owner, how could the plaintiffs expect to be compelled at the hearing to prove their right as ſeparate creditors, and to meet the evidence from theſe receipts? If by expreſs contract credit is given to two, yet the creditor has a right to look to the legal title; and has a right to ſue the perſon, having the ſeparate property; according to what Lord *Mansfield* ſays in *Rich* v. *Coe* (*a*) as to the treble ſecurity; one of which is in reſpect of the legal ownerſhip, having the perſonal ſecurity; which is not prevented by the expreſs contract. If an action had been brought againſt *Nantes* in the life of *Chiſwell*, could a plea in abatement have been put in under theſe circumſtances: *Nantes* having the regiſtry in his own name, and all the legal documents of the property? The bankruptcy makes a very conſiderable queſtion here: ſo alſo may the death of the party. The law has not gone the length, that ſpecific effects fraudulently purchaſed by one partner with the partnerſhip property may be followed. The viſible ownerſhip, as far as it goes, is upon the circumſtances with *Nantes*. After the diſcovery by *Chiſwell* of the fraud committed by *Nantes* in this application of the partnerſhip property the viſible ownerſhip remained preciſely the ſame; and farther, the regiſtry was continued in the name of *Nantes* for the fraudulent purpoſe of defeating the Contract Act. If *Nantes* had become a bankrupt, the anſwer to a claim by *Chiſwell* would have been the ſtatute of *James* 1.; which, as far as it applies, is with the plaintiffs. The equities are equal; and then this Court will not interfere without ſome particular circumſtances.

Lord Chancellor—The firſt queſtion, whether theſe plaintiffs are ſeparate creditors is eaſily diſpoſed of. It is not contended, that all the plaintiffs are joint creditors; and one ſeparate

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(*a*) *Cowp.* 636. See 7 *Term Rep. B. R.* 312.

creditor may maintain the bill on behalf of himſelf and all other ſeparate creditors; and there is one.

The principal queſtion is, whether theſe ſhips are joint or ſeparate property. As to the former of theſe acts of Parliament it is enough to ſay, the Legiſlature had in view a particular policy. The Court is to collect, by what means they meant to enforce it; and if that can be collected, the duty of the Court is to give that conſtruction to the act, that will enforce the means. The act is founded upon this; that it is wiſe and politic, for the purpoſe of giving encouragement to *Britiſh* ownerſhip and ſhips *Britiſh*-built, that there ſhall be this regiſtry; and to effect that policy it has been thought neceſſary, that upon every transfer of the ſhip there ſhould be ſome document of that transfer, to enable you to trace the ſhip through its ownerſhip and connections from firſt to laſt; to aſcertain, whether ſhe has been ever wholly or partly owned by foreigners; and her conſtruction and repairs in a *Britiſh* or a foreign port. For this purpoſe the ſtatute has preſcribed the form; and particularly, that the certificate of the regiſtry ſhall be recited in terms. Shortly afterwards the caſe of *Hibbert* v. *Rolleſton* occurred; when it was conceived, that the party taking the transfer had an equitable intereſt, though no legal property, the directions of the act not being purſued; and that an equity aroſe to have the title deed reformed. It was compared to the caſe of a bargain and ſale without enrolment; in which this Court would compel the vendor to make a good title. On the other hand it was contended, that the policy of the act required, in a caſe, where the title was to be acquired by the contract of the party, not implied, which was not carried into execution preciſely according to the terms of the act, that this Court ſhould not interpoſe. This was one of the caſes, in which Lord *Thurlow*, when reſigning the Great Seal, ſent his decree to the Regiſter, without aſſigning any reaſons: but I know, his Lordſhip's opinion was, as Lord *Kenyon* has intimated, that he could no more reform the title, where the intereſt was derived under the party's own act and contract, not executed in the terms of the ſtatute, than he could reform an annuity deed, not according to the annuity act (*a*).

In the caſe of a bargain and ſale without enrolment the vendor will be compelled to make a title.

Where the intereſt in a ſhip is derived under the party's own act and contract, not executed according to the Regiſtry Act, it cannot be reformed in equity any more than an annuity deed, not according to the annuity act.

(*a*) Stat. 17 *Geo.* 3. *c.* 26.

Camden v. *Anderſon* followed that caſe; and I was a good deal ſtruck with it; for it went this length. The declaration muſt neceſſarily aver, in whom the intereſt is; and they averred, it was in four; and proved, that the regiſtry was in the name of two only; and the Court of *King's Bench*, which has gone to the thinneſt intereſt to ſupport a policy of inſurance, held, that the averment was not ſubſtantiated by the fact. That caſe therefore very ſtrongly confirms *Hibbert* v. *Rolleſton*. But it muſt be remembered, the two parties claiming to be partners claimed by their own act; where their contract and title were not according to the terms of the act. The caſe then requires this; that if a man enters into a partnerſhip, where one of the articles is a ſhip, there muſt be a new regiſtry. The occaſion of the ſecond act (*a*) was the doubts thrown out in *Rolleſton* v. *Hibbert*; and the policy of the former act was thought ſo material to the intereſts of this counry, that a declaratory clauſe (*b*) was put in the ſecond act in direct oppoſition to thoſe doubts.

Whether the Ship Regiſtry Acts, 26 *Geo.* 3. and 34 *Geo.* 3. have any effect upon truſts implied or ariſing by operation of law, *Quære.*

I deſire it to be diſtinctly underſtood, that I give no opinion whatſoever upon the effect of thoſe two acts of Parliament in caſes of truſts implied by law, and not ariſing out of an act, in which the contracting parties join. It is unneceſſary to ſay any thing upon that farther than that in a great variety of caſes the intereſts of mankind would require the Court to conſider long, before they ſhould ſay, thoſe ſtatutes would prevent truſts implied or ariſing by operation of law. But in this inſtance I am relieved from any neceſſity of determining, either that the caſes, that have been decided, are right, or of conſidering, what ought to be the deciſion upon that ſort of caſe, which I have juſt noticed; for it is perfectly clear, that, if this is to be conſidered as a queſtion between *Chiſwell* and *Nantes*, the former could not be heard to ſay, he had any intereſt in theſe ſhips. I do not go upon the circumſtance, how *Nantes* got the money, with which he purchaſed them; whether it was *Chiſwell*'s money, poſſeſſed by contract with him, or by fraud; or whether he laid out that ſpecific money in this purchaſe. He did acquire theſe ſhips in his own individual perſon; and *Chiſwell* to effect the purpoſe he had muſt be underſtood to have agreed, that *Nantes* ſhould be apparently

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(*a*) Stat. 34 *Geo.* 3. *c.* 68.

(*b*) Sect. 14.

the ſole owner. The reaſon for waiving any right *Chiſwell* had in conſequence of the manner, in which *Nantes* made this purchaſe, the object of keeping the ſhips regiſtered in the name of *Nantes*, was, that a profit might be made by the employment of them in contracts with Government; and *Chiſwell* was a member of Parliament; who, the law ſays, ſhall not be a contractor. The moment the purpoſe to defeat the policy of the law by fraudulently concealing, that this was his property, is admitted, it is very clear, he ought not to be heard in this Court to ſay, that is his property. In the caſe of a bill filed to have a reconveyance of a qualification given by the plaintiff to his ſon to enable him to ſit in Parliament, the purpoſe being anſwered, the bill was very properly diſmiſſed by Lord *Kenyon* with coſts.

Bill for a reconveyance of a qualification to ſit in Parliament given by a father to his ſon diſmiſſed with coſts.

Then ſhall the creditors of *Chiſwell* claim the benefit? It is contended, that they ſhall, by the operation of the Statute of *James* 1.: theſe ſhips having been in the order and diſpoſition of *Chiſwell* and *Nantes*. For that purpoſe they muſt be ſo at the time of the bankruptcy. If that was true in fact, poſſibly the argument might be ſuſtained. In the caſe of *Shakeſhaft*, *Stirrup*, and *Saliſbury*, all three being manufactures in *Lancaſhire* ſold their goods in *London* in the names of *Shakeſhaft* and *Stirrup* only. A credit was therefore acquired by them as three in *Lancaſhire* and two in *London*, which affected the diſtribution of their property in bankruptcy. It might be therefore contended, that where the order and diſpoſition was, there the property as among the creditors ſhould be taken to reſide at the bankruptcy. But in this inſtance it is not true in fact; and it is hardly poſſible it ſhould; for the circumſtance, that the bankruptcy happened ſo ſoon after the death of *Chiſwell*, does not vary the caſe. The creditors thought proper to carry in the bills for furniſhing the ſhips in the name of both. But that is not deciſive: the houſe being in great repute; and the bills being ſo carried in to them rather as living together. As to the books, no evidence can be received by them. As to the viſible property and ownerſhip, the purpoſe of *Chiſwell* required it to be in *Nantes* alone. The regiſtry was in his ſingle name; and he alone made the agreements with the maſters and ſailors; and though the inquiry I directed has not produced all the effect, it has eſtabliſhed, that nothing can be produced, attributing the ownerſhip of theſe veſſels to *Chiſwell*. The perſons,

Partnerſhip of three manufacturers in *Lancaſhire* ſold their goods in *London* in the names of two only: upon their bankruptcy as among their creditors the property was held to be, where the order and diſpoſition was at the time of the bankruptcy, according to Stat. 21 *Jam.* 1. c. 19. ſ. 10, 11.

on whoſe behalf the contracts were made, are deſcribed generally as owners; and *Nantes* acting ſolely, the weight of the evidence is, that the ownerſhip and diſpoſition with the world was in *Nantes* only. Another circumſtance is, that in fact the ownerſhip muſt by the previous death of *Chiſwell* be with *Nantes* only at the time of the bankruptcy. Nothing of truſt for himſelf and *Chiſwell* occurs in this caſe.

Therefore without carrying the authorities farther, or farther confirming them, or inquiring into the effect of any truſt ariſing by operation of law as to theſe acts, I am of opinion, that the legal property is in *Nantes;* and there was no viſible ownerſhip in any one elſe, making it juſt, that this, which was ſeparate property between the partners, ſhall not be ſeparate property between their creditors. This therefore is ſeparate property; and to be diſtributed as ſuch.

ALSAGER *v.* ROWLEY.

March 12, 13, 16.

The general principle, on which a debtor to the eſtate cannot be made a defendant to a bill by a creditor or reſiduary legatee againſt the executor, unleſs colluſion, inſolvency, or ſome ſpecial caſe, applies equally to the caſe of a creditor over-paid by the executor.

In a caſe of that ſort upon the circumſtances of ſuſpicion, particularly attending to the character of the creditor, as attorney and confidential agent to the teſtatrix, an iſſue was directed.

THE circumſtances, under which this bill was filed, are ſtated in a former Report (*a*).

The cauſe coming on for hearing was argued very fully upon the circumſtances, as to the demand ſet up by the defendant *Johnſon;* and a great deal of evidence was produced on both ſides; upon which it was contended for the plaintiffs, that colluſion between the executors and *Johnſon* was eſtabliſhed; that the proceeding before the arbitrator, under which the ſum of 1,175*l.* 9*s.* 8½*d.* was awarded as due to *Johnſon*, was a mere pretence; the charges being admitted without any inveſtigation in conſequence of the colluſion of the parties; and the attention of the arbitrator not being directed to the real object of the inquiry.

(*a*) Reported *Ante*, vol. 4. 217. by the name of *Alſager* v. *Johnſon*, upon an exception to the Maſter's Report, that the anſwer of the defendant *Johnſon* was impertinent.

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Mr. Mansfield, *Mr. Richards*, *and Mr. Johnſon for the plaintiffs* alſo inſiſted ſtrongly on the peculiar character and duty of *Johnſon*, as attorney and confidential agent to the two Mrs. *Alſagers*.

Mr. Romilly and Mr. Fonblanque for the defendant Johnſon inſiſting, that the colluſion was not made out, and inſolvency in the executors not being ſuggeſted, relied on *Utterſon* v. *Mair* (*a*) and the other caſes of that claſs, as authorities, that the defendant *Johnſon* was improperly made a party to this bill; that if the reſiduary legatee can file ſuch a bill, every creditor and every pecuniary legatee may; that this is by the circuity of a bill in equity getting a re-examination at law of that, which has finally failed at law; and the utmoſt amount of the caſe is a *devaſtavit* in the executors; with which the defendant *Johnſon* has nothing to do.

March 16.

Lord CHANCELLOR—The eſtabliſhed rule of the Court is certainly, as it has been argued upon *Utterſon* v. *Mair* and the other caſes, that in ordinary caſes a debtor to the eſtate cannot be made a party to a bill againſt the executor: but there muſt be, as the caſes expreſs it, colluſion or inſolvency. That very principle admits, that, if there is ſolvency, the executor muſt pay: if there is colluſion, both are liable. As to colluſion, I have a manuſcript caſe, a note of Mr. *Brown*, a conſiderable practiſer in this Court formerly; and it is confirmed by Lord *Hardwicke*'s note; which I alſo have. The caſe is *Beckley* v. *Dorrington*: the 12th of *December* 1737; and is a material authority with reference to *Utterſon* v. *Mair* and the other caſes. The note is this:

" One of two reſiduary legatees brought his bill againſt the
" executor and the other reſiduary legatee and a debtor; ſuggeſt-
" ing no fraud; nor ſuggeſting any negligence in the executor.
" The bill was diſmiſſed as againſt the debtor at the Rolls. Upon
" appeal the Lord Chancellor ſaid, there is no doubt, this is an
" improper bill as againſt the debtor. It cannot be without a

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(*a*) *Ante*, vol. 2. 95. 4 *Bro. C. C.* 270. *Doran* v. *Simpſon*, *ante*, vol. 4. 651. *Troughton* v. *Binkes*, *ante*, 573. *Elmſlie* v. *M'Aulay*, 3 *Bro. C. C.* 624. *Iſaac* v. *Humpage*, 3 *Bro. C. C.* 463. *Ante*, vol. 1. 427.

" ſpecial

"ſpecial caſe; for there can be regularly no ſuit againſt the "debtor but by the executor; who has the right both in law "and equity. If he even releaſes, and is ſolvent, neither a creditor of the teſtator nor a reſiduary legatee can bring any bill "againſt that debtor. There muſt be colluſion or inſolvency, or "ſome ſpecial caſe: otherwiſe it would overthrow all the law relating to *devaſtavits* and the rights and property of executors. "The Court will interfere, if there is ſuch ſpecial caſe; as colluſion or inſolvency; and then the bill may be brought againſt "both the debtor and the executor. But here this bill is not "founded upon any ſpecial caſe; and there muſt be a ſpecial "caſe: or otherwiſe the bill is inconſiſtent with the general rules "both of Law and Equity."

Lord *Hardwicke* there in the judgment does not ſtate any thing as to negligence. That is in the argument by the Counſel; and in *Newland* v. *Champion* (*a*) delay in the repreſentative is alſo ſtated as one of the ſpecial caſes, as well as colluſion: but no notice is taken of the former in the judgment. If the general principle will not allow you to bring a bill againſt both the executor and a debtor in the given caſe, the ſame principle will apply to the caſe, where you bring a bill againſt the executor and a creditor improperly paid by the executor: that is, that, if there is no colluſion, or ſpecial caſe, if the executor is not inſolvent, he ſtands the middle man, reſponſible to the reſiduary legatee for the property, miſapplied by paying a man as a creditor, who was not a creditor, as in the other caſe for the property outſtanding in a debtor.

Theſe principles, connected with the circumſtances appearing in this caſe, would enable the Court to reach the executors, if it turns out, that no demand was due to *Johnſon*, or a leſs demand than is eſtabliſhed by the award. With reſpect to colluſion, it is very difficult to define, what that is. I agree, it is not neceſſary, that the parties ſhould talk over the matter in a room, as they appear to have done in this inſtance at *Congleton*, in order to ſettle, what demand ought to be made againſt the eſtate: but colluſion muſt depend upon all the circumſtances; and where a creditor

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(*a*) 1 *Veſ.* 105.

ſeeks to appropriate to himſelf the advantage ariſing from the too great facilities the executors may have given him to ſubſtantiate his demand, or too great readineſs in admitting it, the caſe as againſt a creditor, before it can be ſaid, there is not colluſion, muſt be examined with very nice and critical attention; and there is ſufficiently grave evidence in this caſe to make the Court heſitate long, before it would ſay, there is not that, which this Court would deem colluſion between theſe parties.

But I am alſo diſpoſed to think, the defendant *Johnſon* will not ſtand in this caſe altogether, as a mere creditor would in any other given caſe; for there is a vaſt difference with regard to his reſponſibility from the nature and ſpecies of the character belonging to him as a creditor in this particular caſe. This is not the caſe of a perſon ſupplying goods to the teſtatrix, in which he ſays, he has a right to charge what he thinks proper, putting himſelf in an adverſe ſituation with the perſon, with whom he is dealing. This is not a caſe, in which there is no duty whatſoever upon the creditor. He ſtood in the lives of theſe ladies in a ſituation, in which he was as much bound to protect them againſt himſelf as againſt any other perſon making a demand upon them (*a*): at leaſt that has been carried very far in argument in this particular caſe. If the Jury ſhould believe, that his demand was only 7 *l.*, according to the evidence of one witneſs, it would be very ſtrong for a Court of Equity to ſay, that under theſe circumſtances, and conſidering his character with reſpect to them, he did not act unconſcientiouſly in ſtating to the executors that demand to be above 1,400 *l.* He was bound to repreſent it to them accurately. I am inclined therefore in this caſe to think, a decree might be made againſt *Johnſon* without intrenching upon the principle eſtabliſhed in theſe caſes. I go upon this. The queſtion, whether any debt was due, and to what extent, has never been tried with that ſearching attention, which theſe reſiduary legatees had a right to expect from the executors. There muſt be farther inquiry by an iſſue, to go to theſe points: 1*ſt*, Whether any debt is due; and I think, it is impoſſible not to ſay, there is; and it muſt enable them to examine it in each year; and whether at the deaths of theſe ladies the debt of each

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(*a*) *Gibſon* v. *Jeyes*, *ante*, 266.

preceding year continued: ſo as to determine, how long the debt has exiſted. If the reſiduary legatees think proper, I will direct an iſſue, to embrace all the conſiderations I have ſtated.

An iſſue was afterwards directed.

Rolls. March 15, 16.

NAIRN *v.* PROWSE.

The conſideration of marriage runs through the whole ſettlement; and eſpecially ſupports every proviſion with regard to the huſband and wife. She is intereſted in the proviſion for her huſband, enabling him to provide for her and the children; and it is not affected by ſubſequent events, as the death of the wife without children.

Vendor's equitable lien upon the eſtate for the purchaſe money loſt by taking a ſpecial ſecurity by way of a pledge of ſtock. Whether every ſecurity would have that effect, *Quære*.

Whether the vendor's lien could prevail againſt an equitable mortgage by depoſit of deeds, *Quære*.

THE Maſter's report, under a decree in this cauſe upon a bill by creditors, ſtated, that *Mary Ann Glubb*, widow and executrix of *John Glubb*, brought in a charge, ſupported by affidavits; whereby it appeared, that *Maurice Lloyd* married *Hannah Mary Palmer*, widow, the mother of *William Vaughan Palmer*, then about five years old; who from that time until his marriage lived with *Maurice Lloyd*, as part of his family, except when at ſchool; and was treated by him as his own child; and by a bond, dated the 10th of *April* 1784, reciting a marriage intended between *William Vaughan Palmer* and *Emily Warren Glubb*, daughter of *John Glubb*, and that in conſideration of the portion to be advanced by *Glubb* it was agreed, that *Lloyd* ſhould become bound to *Glubb*, that the heirs, executors, or adminiſtrators, of *Lloyd* ſhould within ſix months after his deceaſe pay to *Glubb*, his executors, *&c.* 3,000 *l.*, to be placed at intereſt for the purpoſes, and ſubject to the proviſoes expreſſed in an indenture of even date, *Maurice Lloyd* became bound accordingly.

By indentures of the ſame date, reciting the intended marriage and the ſaid bond, *Glubb* accordingly covenanted with *Lloyd*, that he, his executors, *&c.* ſhould, as ſoon as conveniently could be after *Lloyd*'s death, and after he ſhould have received the 3,000*l.* lay it out; and pay the intereſt to *William Vaughan Palmer* for life, ſubject to a proviſo, determining his intereſt upon the event of his ſurviving his intended wife, and having no iſſue by her then living, or, having iſſue, the death of all under twenty-one and unmarried; and after his deceaſe, in caſe ſhe ſhould ſurvive him, to pay the intereſt and dividends to her for life; and after the deceaſe of the ſurvivor to pay, &c. the principal unto and amongſt all and every the child and children, equally; and in caſe there ſhould be no child, or all ſhould die under twenty-one and unmarried, in truſt for the executors, &c. of *Lloyd*.

The marriage took place on the 20th of *April* 1784, and there are three children; who, with their father, are living: but the mother is dead. It was admitted, that the 3,000*l.* has not been paid. *Maurice Lloyd* died on the 2d of *June* 1796.

By another bond, of the ſame date, reciting the intended marriage, and that on the treaty it was among other things agreed, that *Lloyd* towards a proviſion for *Palmer* and his intended wife ſhould pay to *Palmer* an annuity of 130*l.* for his life, or until *Lloyd* ſhould procure him an appointment, producing that income, *Lloyd* bound himſelf to *Glubb* accordingly. That annuity, it was admitted, was paid up to the death of *Lloyd*, but no payment had been made ſince; and no appointment had been procured for *Palmer*.

By indentures of the ſame date, reciting the intended marriage, and, that it had been agreed, that *Glubb* ſhould ſettle 1,000*l.* upon the truſts after expreſſed, he covenanted with *Maurice Lloyd*, that he would place out that ſum in their names, upon truſt to pay the intereſt, dividends, &c. to the intended wife for life for her ſeparate uſe; and after her deceaſe to the huſband for life, and after the deceaſe of the ſurvivor to pay the capital to the children (as in the other indenture), and if there ſhould be no child, or all ſhould die under twenty-one and unmarried, upon truſt for the ſurvivor of the huſband and wife.

That ſum was accordingly inveſted in 1120*l.* 5 *per cent.* Navy Annuities in the names of *Lloyd* and *Glubb*; and *Lloyd* paid the dividends to Mrs. *Palmer*, until he ſold out the ſtock on the 4th of *February* 1786 for 1150*l.*, having obtained a power of attorney from *Glubb*; and *Lloyd* applied the money to his own uſe; but continued to pay the dividends to Mrs. *Palmer* till his death.

The Report then ſtated affidavits to ſhew, that *Maurice Lloyd* was conſiderably indebted, and inſolvent in *April* 1784. It farther ſtated, that he had on his marriage with the mother of *Palmer* covenanted to ſettle for the benefit of *Palmer* 1500 *l.* 4 *per cent.* annuities; the value of which he paid to *Palmer* on his attaining twenty-one; and received a releaſe, dated the 20th of *February* 1783.

The Report farther ſtated, that the defendant *Michell* was ſeiſed in fee of eſtates in *Somerſetſhire*, and poſſeſſed of leaſehold premiſes for terms of ninety-nine years, determinable on lives; and by indentures, dated the 5th of *June* 1795, *Michell* agreed to convey to *Maurice Lloyd*, his heirs, executors, &c. the ſaid eſtates on or before the 24th of *June* inſtant; and *Lloyd* agreed, that in conſideration of ſuch conveyance he would on or before the ſaid 24th of *June* transfer into the name of the ſaid defendant ſo much Long Annuities as would produce the ſum of 100 *l. per annum*, with the dividends due thereon; and in caſe the average ſelling price of Long Annuities ſhould not riſe within two years, ſo that the ſtock ſo to be transferred might be ſold for 2200 *l.*, *Lloyd*, his executors, &c. would pay to the defendant the ſum of 2200 *l.* or receiving from him a retransfer of the ſaid annuities: provided, it ſhould be at the option of *Lloyd* at any time within the two years to pay defendant ſo much money as with the then ſelling price of ſuch Long Annuities would produce 2200 *l.*

The Report ſtated, that the eſtates were conveyed and aſſigned accordingly; and a receipt for 2200 *l.*, the conſideration of the purchaſe, was ſigned on the back of the conveyance of the freehold eſtates; and the title deeds were delivered to *Lloyd*. By articles of agreement, dated the 31ſt of *July* 1795, reciting the articles of the 5th of *June*, and the conveyance, and that *Lloyd* had transferred the Long Annuities, he covenanted according to the proviſions of the former articles, that in caſe the average price of the Long Annuities ſhould not riſe within two years, ſo that the ſtock ſo transferred might be ſold for 2200 *l.* he would pay the 2200 *l.* on receiving a transfer of the annuities; ſubject nevertheleſs to a proviſo, empowering *Lloyd* to demand from the defendant a transfer of the ſaid annuities on payment of 2200 *l.* to him; and the defendant covenanted to transfer on payment of that ſum.

It then ſtated, that *Lloyd* did not during his life propoſe to pay the 2200 *l.*; and that the ſtock did not riſe within the two years, ſo that it could be ſold for that ſum; and after the deceaſe of *Lloyd* on the 2d of *June* 1796, *viz.* in *July* 1797, the defendant with the conſent of the adminiſtratrix ſold the Long Annuities for 1481 *l.* 5 *s.* The defendant therefore claimed a lien on the eſtate for 718 *l.* 15 *s.*, the reſidue of the purchaſe money, with intereſt.

With reſpect to the debt of the plaintiff *Nairn* the Report ſtated, that on the 15th of *March* 1796 *Maurice Lloyd* borrowed from *Nairn* 2000 *l.* on the depoſit of a bill or note for that ſum, and *Lloyd* agreed to pay intereſt at 5 *per cent.* On the 16th of *April* 1796, ſome time before that bill became due, *Nairn* delivered up that bill to *Lloyd*; and received from him the conveyance by leaſe and releaſe, dated the 13th and 14th of *July* 1795 of the *Somerſetſhire* eſtates in conſideration of 2200 *l.* in truſt for *Lloyd*, his heirs and aſſigns, and alſo his promiſory note payable after the 25th of *June* next on three days' notice. A term of 1000 years, commencing in 1782, of part of the eſtate had been on the 14th of *July* 1795 aſſigned to a truſtee for *Lloyd*, his heirs or aſſigns, to attend the inheritance. That aſſignment was not delivered to *Nairn*.

The Maſter found therefore, that the ſaid indentures of leaſe and releaſe were depoſited as a ſecurity for the 2000 *l.* and intereſt.

The cauſe coming on for farther directions the queſtions were, firſt, upon the claim of Mrs. *Glubb*, as repreſentative of her huſband, againſt the eſtate of *Lloyd* in reſpect of the inſtruments executed upon the marriage of his ſon-in-law *Palmer*; whether that marriage was a ſufficient conſideration to ſupport them againſt

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againſt the creditors of *Lloyd*, as to the proviſions for *Palmer*, the huſband, *viz.* the intereſt of the 3000*l.* for his life, and the annuity of 130*l.* 2*dly*, Whether the defendant *Michell* under the circumſtance, that he had taken a ſecurity for the purchaſe money of the eſtate he ſold to *Lloyd*, could have a lien on the eſtate, as vendor; and if he ſtill retained the lien. 3*dly*, Whether he could inſiſt upon it as againſt the plaintiff *Nairn*.

Mr. Romilly and Mr. Leach for the plaintiff—Upon the queſtion of lien, there is no lien in this caſe. The circumſtance of taking a ſecurity is a relinquiſhment of the lien of the vendor upon the eſtate: *Bond* v. *Kent* (*a*), *Fawell* v. *Heelis* (*b*). Thoſe caſes are queſtioned in *Blackburn* v. *Gregſon* (*c*), but the doubt reſts upon no authority but that opinion of Lord *Loughborough*. In *Chapman* v. *Tanner* (*d*) it appears from the Regiſter's book, as was obſerved by Lord *Bathurſt* in *Fawell* v. *Heelis*, that the vendor had retained the deeds. It never can be ſaid, that this defendant did not mean to relinquiſh his right upon the eſtate; for from the nature of the ſecurity he has expreſsly done ſo. If the vendor takes no ſecurity, he has a lien; for he has not parted with the eſtate. But in this caſe he has not only relied upon a ſecurity, but a ſecurity poſtponed to a future time. He is in the ſituation of a mortgagee, who has poſtponed himſelf by negligence. The plaintiff, as an equitable mortgagee, is a purchaſer for valuable conſideration without notice. Between equities that, which has the ſtrongeſt right to call for the legal eſtate, is protected. Could this vendor have had an injunction? A Court of Equity would at the ſuit of *Nairn* have compelled *Lloyd* to ſuffer *Nairn* to uſe his name to recover poſſeſſion, or to have the legal eſtate conveyed.

Mr. Alexander and Mr. Fonblanque for the defendant Michell contended, that there was an equitable lien in conſideration of the money not being actually paid; relying on the opinion expreſſed by Lord *Loughborough* in *Blackburn* v. *Gregſon*, that the lien remains under ſuch circumſtances; and inſiſted, that there was no other criterion between theſe parties than the priority in point of time.

(*a*) 2 *Vern.* 281.

(*b*) *Amb.* 724. 1 *Bro. C. C.* 422. note, Ed. 3.

(*c*) 1 *Bro. C. C.* 420.

(*d*) 1 *Vern.* 267.

Mr. Hall for Mrs. *Glubb* inſiſted, that the marriage was a ſufficient conſideration to ſupport all the uſes of the ſettlement; and cited *Newſtead* v. *Searles* (*a*); in which it was held, that the marriage was a ſufficient conſideration for children by a former marriage.

Mr. Romilly in reply—The ſecurity is in effect a covenant to pay at the end of two years. Can it be contended, that the vendee was not owner during that time? Could he not have contracted for the ſale of the eſtate? Except the *dictum* of Lord *Loughborough* in *Blackburn* v. *Gregſon* there is no authority for a lien, where the vendor has taken a ſecurity. According to a manuſcript note of *Fawell* v. *Heelis* Lord *Bathurſt* gives a much more full account of *Chapman* v. *Smith* than upon examining the regiſter's book appears in the Report; ſtating, that there was a ſpecial agreement, that the vendor ſhould keep the writings; and he had not taken a ſecurity; and therefore there was a lien. That caſe therefore is no authority whatſoever upon this queſtion. It does not appear in *Blackburn* v. *Gregſon*, upon what ground Lord *Camden* proceeded in *Tardiff* v. *Scrughan*. It does not appear, that he went upon a lien. The ſecurity taken in this caſe, with the peculiar circumſtance, that the payment is ſo diſtant, during which time the vendor deprived himſelf of all remedy, muſt have the effect of diſcharging the eſtate.

The next queſtion is, whether a lien can be claimed as againſt the plaintiff, an equitable mortgagee. In *Pollexfen* v. *Moore* (*b*) Lord *Hardwicke* ſays, this equity ſubſiſts only between vendor and vendee; and no third perſon can avail himſelf of it (*c*). Could the defendant, having put it in the power of *Lloyd* to make ſuch a ſecurity, have got the deeds from the plaintiff? A Court of Equity would have given no aſſiſtance for that purpoſe. The plaintiff might have brought an ejectment in the name of *Lloyd*; and the Court would have compelled him to let his name be uſed. The plaintiff might have got the legal eſtate. It is not pretended, that the defendant ſet up any claim for part of the purchaſe money unpaid. The plaintiff therefore has a right to avail himſelf of his ſituation; having the deeds; and being in a

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(*a*) 1 *Atk.* 265.

(*b*) 3 *Atk.* 272.

(*c*) See *Auſten* v. *Halſey*, *ante*, 475.

ſituation to file a bill and get the legal eſtate from *Lloyd*. There is no authority eſtabliſhing, that where perſons have different equities upon different grounds, the Court will only regard the time; and conſider the perſon having priority in time to have priority in law. The Court will conſider the circumſtances; whether there has been laches, &c.; as in the familiar caſe of 1ſt, 2d, and 3d, mortgagees. The plaintiff therefore is entitled to have the ſum of 2000*l.* paid out of the produce of the eſtate ſold before the Maſter; and the defendant *Michell* can come in only with the other ſimple contract creditors.

The Maſter of the Rolls—It is admitted, that Mrs. *Palmer* is to be conſidered a purchaſer with reſpect to the proviſion made for her and her children by the deeds executed by *Lloyd* previouſly to the marriage of Mrs. *Palmer*; though he was under no obligation to make ſuch proviſion: the marriage being a conſideration for it. It is then contended, that with regard to the proviſion made for the huſband Mr. *Palmer* this is to be conſidered merely a voluntary ſettlement; and therefore *Glubb*, the truſtee, is not entitled to claim in reſpect of the annuity of 130*l.* or the intereſt of the ſum of 3000*l.* for the life of *Palmer*. There is no ſuch diſtinction. The conſideration runs through the whole ſettlement. It has been ſometimes doubted, whether the conſideration of marriage would extend to objects unconnected with the marriage, as remainders to collateral relations. But every proviſion with regard to the huſband and wife falls directly within the conſideration; and the wife is intereſted in the proviſion for the huſband as well as that for herſelf. The marriage is conſented to, in conſideration, not only of her intereſt in the event of ſurvivorſhip, but of his income and the proviſion he is thereby enabled to make for her and her children during his life. It is not material, that, when the proviſion is made for the huſband, it may be liable to his debts. She takes the chance of that; juſt as ſhe does, if ſhe marries a man of fortune; ſuppoſing, that in the event of debts contracted his creditors may take his fortune from him. But he has the means of providing for his family. When the proviſion is once made, as it has been by the marriage, no event afterwards can alter it. The queſtion is, whether at the time it was voluntary, or upon good conſideration. It is immaterial therefore, that in this inſtance

ſtance the wife is dead. If it was neceſſary, it might be ſaid, the proviſion for the huſband enables him to maintain the children. But the caſe would be the ſame, if there were no children; for if a ſettlement is made upon the marriage of a ſon upon the huſband and wife for their lives, and afterwards upon the children, and the wife dies without any iſſue, and therefore the huſband is the only object, it could not be contended, that the father's creditors could impeach that ſettlement; and take from the ſon the proviſion for his life; and if not in that caſe, it cannot be done in the caſe of a ſtranger; for it is not from the relation of father and ſon that the creditors are debarred. If it was a mere voluntary ſettlement of that ſort, it could not be protected from creditors. But the conſideration of marriage protects it (a).

Upon the queſtion as to the claim ſet up by *Michell* to a lien, it is now ſettled, that equity gives the vendor a lien for the price of the eſtate ſold without any ſpecial agreement. But, ſuppoſing he does not truſt to that, but carves out a ſecurity for himſelf, it ſtill remains matter of doubt, and has not received any poſitive deciſion, whether that does or does not amount to a waiver of the equitable lien; ſo as to preclude the vendor from reſorting back to that lien, the ſecurity proving inſufficient. Without entering into that queſtion, whether every ſecurity neceſſarily amounts to a waiver, it is impoſſible to contend, that there may not be a ſecurity, that will have that effect, that will be a waiver. By conveying the eſtate without obtaining payment a degree of credit is neceſſarily given to the vendee. That credit may be given upon the confidence of the exiſtence of ſuch a lien. The knowledge of that may be the motive for permitting the eſtate to paſs without payment. Then it may be argued, that taking a note or a bond cannot materially vary the caſe. A credit is ſtill given to him; and may be given from the ſame motive; not to ſuperſede the lien, but for the purpoſe of aſcertaining the debt, and countervailing the receipt indorſed upon the conveyance. But, if the ſecurity be totally diſtinct and independent,

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(a) As to the extent of the conſideration of marriage, ſee *ante*, vol. 2. 410. and the references in Mr. *Sanders*'s note, 3 *Atk.* 188. to *Goring* v. *Naſh*.

pendent, will it not then become a caſe of ſubſtitution for the lien, inſtead of a credit given becauſe of the lien? Suppoſe, a mortgage was made upon another eſtate of the vendee: will equity at the ſame time give him what is in effect a mortgage upon the eſtate he ſold: the obvious intention of burthening one eſtate being, that the other ſhall remain free and unencumbered? Though in that caſe the vendor would be a creditor, if the mortgage proved deficient, yet he would not be a creditor by lien upon the eſtate he had conveyed away. The ſame rule muſt hold with regard to any other pledge for the purchaſe money. In this caſe the vendor truſts to no perſonal ſecurity of the vendee; but gets poſſeſſion of a Long Annuity of 100*l.* a year; which according to the riſe or fall of ſtock might or might not be ſufficient for the purchaſe money. He has therefore an abſolute ſecurity in his hands, not the perſonal ſecurity of the vendee. Could the vendee have any motive for parting with his ſtock but to have the abſolute dominion over the land? It is impoſſible, it could be intended, that he ſhould have this double ſecurity, an equitable mortgage, and a pledge, which latter, if the ſtock ſhould riſe a little, would be amply ſufficient to anſwer the purchaſe money.

Therefore, without entering into the general queſtion, whether every ſecurity taken neceſſarily amounts to a waiver of the lien of the vendor, I am clearly of opinion, that this vendor has by taking this pledge waived his equitable lien. Of courſe therefore he can have no precedency againſt the plaintiff; and can only ſtand *pari paſſu* with the reſt of the creditors; having no preference over them. It is therefore unneceſſary to determine the remaining queſtion.

MILLES *v.* MILLES.

Rolls,
March 16.

A leaſehold eſtate renewable being bequeathed with limitations in the nature of a ſtrict ſettlement, the habit being to renew annually and to underlet, the decree declared, that the fines upon renewal ought to be paid out of the rents and profits; and that the perſon entitled for life undertaking to pay thoſe fines out of the rents and profits was entitled to the fines on renewal of the underleaſes; and a renewal to ſuch of the undertenants as ſhould be deſirous of it was directed.

JEREMIAH MILLES by his will, dated the 29th of *July* 1786, after bequeathing a leaſehold houſe in *Harley* ſtreet to his wife *Roſe Milles* for her life, together with the furniture, plate, and effects, therein, and giving other ſpecific and pecuniary legacies, gave and bequeathed all his freehold and copyhold or cuſtomary manors, meſſuages, farms, lands, tenements, and hereditaments whatſoever and whereſoever, and whether in poſſeſſion, reverſion, or remainder, (reciting, that he had ſurrendered the copyhold part thereof then in his poſſeſſion to the uſe of his will,) with their and every of their rights, members, and appurtenances, to the ſeveral uſes and under and ſubject to the ſeveral powers after limited and declared concerning the ſame: *viz.* to the uſe of the firſt ſon of his body begotten or to be begotten, and of the heirs of his body iſſuing; and for default of ſuch iſſue to the uſe of the ſecond, third, fourth, and all and every other, the ſon or ſons of his body to be begotten, ſeverally, ſucceſſively, and in remainder one after another as they and every of them ſhall be in ſeniority of age and priority of birth, and of the ſeveral and reſpective heirs of the body and bodies of all and every ſuch ſon and ſons iſſuing; the elder of ſuch ſons and the heirs of his body iſſuing always to be preferred and to take before the younger of ſuch ſons and the heirs of his and their body or bodies iſſuing; and for default of ſuch iſſue to the uſe of the firſt daughter of his body begotten or to be begotten and of the heirs of her body iſſuing; and for default of ſuch iſſue, to the uſe of the ſecond, third, fourth, and all and every other the daughter or daughters of his body to be begotten, ſeverally, ſucceſſively, and in remainder one after another as they and every of them ſhall be in ſeniority of age and priority of birth, and of the ſeveral and reſpective heirs of the body and bodies of all and every ſuch daughter and daughters iſſuing, the elder of ſuch daughters and the heirs of her body being always preferred and to take before the younger of ſuch daughters and the heirs of her and their body and reſpective bodies iſſuing; and for default of ſuch iſſue to the uſe of his brother *Thomas Milles* and the heirs of his body; and for default of ſuch iſſue to the uſe of his brother *Richard Milles* and the heirs of his body;

and for default of ſuch iſſue to the uſe of his ſiſter *Harriet Milles* and the heirs of her body; and for default of ſuch iſſue to his own right heirs.

The will then proceeded thus:

"And I give and bequeath all and ſingular my leaſehold manors, "towns, meſſuages, farms, lands, tenements, and hereditaments, "ſituate in the kingdom of *Ireland* or elſewhere, which I hold "under any leaſes for any term or terms of years (and which "are not herein before deviſed), unto my dear wife *Roſe Milles* "and my ſaid brother *Thomas Milles*, their executors, adminiſ-"trators, and aſſigns, for all my eſtate, terms, and intereſt, there-"in; upon truſt, that they the ſaid *Roſe Milles* and *Thomas* "*Milles*, and the ſurvivor of them, his or her executors, adminiſ-"trators, or aſſigns, ſhall and do by and out of the rents and "profits of the ſame leaſehold premiſes reſpectively pay the rents "and annual ſums reſerved in and by the leaſes thereof; and "ſubject thereto do and ſhall renew the leaſes of the ſame pre-"miſes from time to time, and as often as they reſpectively ſhall "deem expedient, but not otherwiſe; of which I leave them ſole "judges; and for that purpoſe do and ſhall from time to time "make ſuch ſurrenders of the leaſes ſo to be renewed as ſhall be "requiſite and neceſſary in that behalf; and do and ſhall by and "out of the rents and profits of the ſame leaſehold premiſes or "by mortgage thereof, or of any part thereof raiſe ſo much money "as ſhall be ſufficient for paying the ſeveral fines and other ne-"ceſſary charges of ſuch renewals, whatever they may chuſe to "renew; and ſubject thereto do and ſhall ſtand and be poſſeſſed "of all the ſame leaſehold premiſes, and ſubject to my wife's life "eſtate my ſaid brother *Thomas Milles*, his executors and ad-"miniſtrators, ſhall ſtand and be poſſeſſed of my aforeſaid leaſe-"hold meſſuage with the appurtenances in *Harley* ſtreet aforeſaid, "together with the pictures, houſehold goods and houſehold fur-"niture, linen, plate, china and glaſs ware and utenſils, that ſhall "be in or about my ſaid leaſehold meſſuage in *Harley* ſtreet at "my death, in truſt for the only or eldeſt ſon for the time being "of my body until ſuch only or eldeſt ſon or ſome one ſuch ſon "ſhall firſt attain the age of twenty-one years or die leaving iſſue "of his body living at the time of his death, which ſhall firſt

“ happen; and then in truſt for ſuch ſon ſo attaining the age of
“ twenty-one years or dying leaving iſſue as aforeſaid, which ſhall
“ firſt happen, his executors adminiſtrators and aſſigns; and if
“ there ſhall be no ſon of my body, who ſhall attain the age of
“ twenty-one years or die under that age leaving iſſue of his
“ body living at his death, then in truſt for the only or eldeſt
“ daughter for the time being of my body until ſuch only or eldeſt
“ daughter or ſome one ſuch daughter ſhall firſt attain the age
“ of twenty-one years or die leaving iſſue of her body living at
“ the time of her death, which ſhall firſt happen, and in truſt for
“ ſuch daughter ſo attaining the age of twenty-one years or dying
“ and leaving iſſue, as aforeſaid, which ſhall firſt happen, her
“ executors adminiſtrators and aſſigns; and if there ſhall be no
“ daughter of my body, who ſhall attain the age of twenty-one
“ years or die under that age leaving iſſue of her body living at
“ her death, then in truſt for my ſaid brother *Thomas Milles*, and
“ his executors, adminiſtrators, and aſſigns, if he or any iſſue of
“ his body ſhall be living at the time of the failure of ſuch iſſue
“ of my body, as aforeſaid; but if the ſaid *Thomas Milles* or any
“ iſſue of his body ſhall not be then living, then in truſt for my
“ ſaid brother *Richard Milles*, and his executors, adminiſtrators,
“ and aſſigns, if he or any iſſue of his body ſhall be living at the
“ time of the failure of ſuch iſſue of my body, as aforeſaid: but
“ if the ſaid *Richard Milles* or any iſſue of his body ſhall not be
“ then living, then in truſt for my ſaid ſiſter *Harriet Milles* and
“ her executors, adminiſtrators, and aſſigns, in caſe ſhe or any
“ iſſue of her body ſhall be living at the time of the failure of
“ ſuch iſſue of my body, as aforeſaid: but if ſaid *Harriet Milles*
“ or any iſſue of her body ſhall not be then living, then in truſt
“ for ſuch perſon or perſons as ſhall at the time of the failure of
“ ſuch iſſue of my body, as aforeſaid, happen to be my heir or
“ heirs at law.”

The teſtator then empowered his wife and brother *Thomas* and the ſurvivor, and his or her heirs, executors, and adminiſtrators reſpectively during the minority of ſuch ſon or daughter of the teſtator's body as ſhould for the time being be entitled under the limitations and truſts aforeſaid of the poſſeſſion of his aforeſaid freehold, copyhold, and leaſehold, eſtates, from time to time by indenture under their, his or her, reſpective hand and ſeal to make

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any leaſe or leaſes of all or any of the ſame freehold, copyhold, or leaſehold, eſtates for any term or number of years whatſoever, and either in poſſeſſion or reverſion, for ſuch fines, and under ſuch rents, and upon ſuch terms and conditions, as the ſaid truſtees ſhould reſpectively think fit; and alſo to ſell and diſpoſe of all or any of the timber or underwood growing upon any of his ſaid freehold, copyhold, and leaſehold, eſtates reſpectively, and which he (the teſtator) might, if living, cut down; with liberty to the purchaſer of the timber, &c. to enter, and carry away the ſame, and do all other neceſſary acts with reſpect to ſuch timber as ſhall be from time to time aſſigned or ſet out by the truſtees reſpectively; and alſo out of the rents and profits of the ſame eſtates to repair and keep in repair all the farms, buildings, hedges, ditches, and fences, thereon, and generally to inſpect, overſee, manage, and ſuperintend, all and ſingular his ſaid freehold, copyhold, and leaſehold, eſtates, and tranſact and do any thing from time to time for the ſupporting, letting, and improving the ſame, and the income thereof and the intereſt of the ſeveral perſons entitled thereto in poſſeſſion and remainder in every particular in the moſt beneficial manner, and to the beſt advantage, as his ſaid truſtees reſpectively ſhould according to their uncontrouled direction and judgment think proper.

The teſtator then reciting, that he was fully ſenſible, how neceſſary it is for the true intereſt of the perſon in poſſeſſion of his *Iriſh* leaſes, that the manager of them for the time being ſhould have the fulleſt and ampleſt power to renew either with his landlord or his ſeveral under-tenants, and ſhould have power either to ſell the intereſt remaining in the ſaid leaſes, or to ſuffer them to expire and run out by failure of ſuch renewals, and that he had the moſt unbounded confidence in the goodneſs and ſound judgment of his dear wife and brother *Thomas*, he thereby gave them the ſame diſcretion and powers in the conduct of his *Iriſh* property, as if the ſame did abſolutely belong to them; and he thereby gave them full authority to act in the ſaid truſt as may ſeem beſt to them, without thinking themſelves bound or called upon to act in any other manner than their own good underſtanding and hearts ſhall dictate to them; and he thereby expreſsly authoriſed and empowered his ſaid wife and brother and the ſurvivor of them at their, her, or his, diſcretion during the continuance of the truſts thereby repoſed in them to ſell and diſpoſe of all or any of his ſaid leaſehold eſtates in *Ireland*, either before or after the leaſes thereof ſhould be renewed, to any perſon or perſons whatſoever for the beſt price, that could be got; and he empowered his ſaid brother *Thomas* during the life of his wife at her deſire and after her death at his diſcretion, if he ſhould deem it for the benefit of the perſon for the time being entitled under the truſts aforeſaid to the rents and profits of his ſaid leaſehold houſe in *Harley* ſtreet, to ſell and diſpoſe of the ſame leaſehold houſe with the appurtenances for all his eſtate and intereſt therein; and he directed, that the money ariſing from his ſaid leaſehold eſtate in *Ireland* and in *Harley* ſtreet ſhould be applied upon the truſts and for the purpoſes herein after mentioned; with the uſual clauſe, that the receipt of the truſtees ſhould be a diſcharge to the purchaſers; and that they ſhould not be obliged to ſee to the application of the money, *&c.*

The teſtator then gave all his monies, ſecurities for money, money in the funds, mortgages in fee and for years, and all his eſtate and intereſt in the premiſes therein compriſed, and all the reſidue and remainder of his goods, chattels, and perſonal eſtate and effects whatſoever and whereſoever not herein before diſpoſed of, to his ſaid wife and brother *Thomas*, and their heirs, executors, and adminiſtrators, reſpectively, upon truſt to convert into money all his ſaid reſiduary perſonal eſtate; and after payment of his debts and funeral and teſtamentary expences, to inveſt the clear ſurplus thereof, together with the clear monies, if any, produced by ſale of all or any of his leaſehold eſtates herein before authoriſed to be ſold, as aforeſaid, in the purchaſe of manors, farms, meſſuages, lands, and tenements or hereditaments, in fee ſimple in *England*; whereof not more than one ſixth in the value of any one purchaſe ſhall be copyhold; and ſettle, convey, and aſſure, the eſtates ſo to be purchaſed to, for, and under, and ſubject to, the ſeveral uſes, limitations, powers, and proviſions, before declared concerning his freehold eſtates before deviſed, or ſuch of them as ſhall be exiſting undetermined and capable of taking effect; but ſubject nevertheleſs to an eſtate for life to be limited to his ſaid wife, if living, in ſuch of the ſaid manors and meſſuages, lands, tenements, and hereditaments, as ſhall be purchaſed with the monies ariſing from the ſale of his leaſehold meſſuage with appurtenances in *Harley* ſtreet; and he directed, that in the mean time and until ſuch purchaſe ſhall be made, the clear ſurplus of his reſiduary perſonal eſtate and from the ſale of his ſaid leaſehold eſtates ſhall be laid out or continued at intereſt in or upon Government or real ſecurity in the names of his ſaid truſtees, with full power to vary the ſecurities from time to time, as they ſhall ſee occaſion; and that the dividends and intereſt of the ſame government or real ſecurities ſhall from time to time be paid to or received by ſuch perſon or perſons as would be entitled to the rents and profits of the ſaid freehold and copyhold eſtates herein before directed to be purchaſed, in caſe ſuch purchaſes were actually made. He appointed his wife and brother *Thomas* executrix and executors of his will.

By a codicil, dated the 28th of *July* 1796, the teſtator after making ſome alterations in and additions to the pecuniary legacies bequeathed by the will proceeded thus:

"And whereas I have by my ſaid will given and deviſed all
" my freehold and copyhold or cuſtomary, manors, meſſuages,
" farms, lands, tenements, and hereditaments, from and after my
" deceaſe to the uſe of my firſt and other ſons ſucceſſively in tail,
" with divers remainders over; and have alſo given and be-
" queathed all my leaſehold eſtates which I hold and am entitled
" to for any terms of years in *Ireland* or elſewhere and which are
" not therein before deviſed to my ſaid dear wife *Roſe Milles* and
" my ſaid brother *Thomas Milles* in truſt from and immediately
" after my death for my eldeſt or only ſon for the time being,
" with divers remainders or limitations in the nature of remain-
" ders over in caſe I ſhall have no ſon that ſhall attain the age
" of twenty-one years or die under that age leaving iſſue, now
" I do by this my codicil give and deviſe all my ſaid freehold and
" copyhold or cuſtomary manors, meſſuages, farms, lands, tene-
" ments, and hereditaments other than and except my two free-
" hold and copyhold eſtates at *Eaſt* and *Weſt Hannifield* in *Eſſex*
" and *Cockfield* in *Suffolk*, from and immediately after my deceaſe
" unto my ſaid wife and her aſſigns during her widowhood; and
" I direct, that ſhe my ſaid wife and my ſaid brother ſhall ſtand
" poſſeſſed of all my ſaid leaſehold eſtates, in truſt that the ſame
" may be held and enjoyed, and that the rents and profits there-
"of

" of may be received and taken, by my ſaid wife during her ſaid " widowhood for her own uſe and benefit."

And from and after the death or ſecond marriage of his ſaid wife then he gave and deviſed all his ſaid freehold, copyhold, or cuſtomary manors, lands, *&c.*, except as aforeſaid, and from and immediately after his deceaſe he gave and deviſed the ſaid excepted freehold and copyhold eſtates, the copyhold part whereof he declared was ſurrendered to the uſe of his will; and he directed, that his ſaid truſtees of his ſaid leaſehold eſtates ſhall ſtand poſſeſſed thereof, to, for, upon, and under and ſubject to, ſuch and the ſame uſes, truſts, powers, and proviſoes, ends, intents, and purpoſes, as he had by his ſaid will limited and expreſſed and declared of and concerning his ſaid freehold, copyhold or cuſtomary and leaſehold eſtates reſpectively; and he thereby gave during the widowhood of his ſaid wife unto her and his ſaid brother, and in caſe of his death to his ſaid wife alone the ſame power of leaſing, ordering, and managing his ſaid freehold, copyhold, or cuſtomary, and leaſehold, eſtates, and of ſurrendering and renewing the leaſes of his ſaid leaſehold eſtates, and of raiſing and paying the fines and fees for renewing ſuch leaſes, and of ſelling his ſaid leaſehold eſtates, and giving receipts for the purchaſe money, and of inveſting ſuch money in the purchaſe of other eſtates, and till ſuch purchaſe of other eſtates in Government or real ſecurities, as are in and by his ſaid will given to his ſaid wife and brother and the ſurvivor of them during the minority of his children; and in all other reſpects he ratified his will.

The teſtator died in 1797; having had no iſſue male; and leaving three infant daughters, his coheireſſes at law.

The bill was filed by the widow; praying, that the plaintiff as tenant for life of the teſtator's ſaid leaſehold eſtates may be declared to be entitled to receive and retain to her own uſe the fines to be paid by the under tenants of the teſtator's leaſehold eſtates upon renewing their reſpective terms therein; and that the defendant *Thomas Milles* may be directed to concur with the plaintiff in granting to ſuch of the reſpective tenants of the ſaid leaſehold eſtates as ſhould be deſirous of renewing their terms therein, leaſes of their reſpective tenements for the full term of twenty years upon their paying to the plaintiff the proper fines for ſuch renewed terms; or in caſe the Court ſhall be of opinion, that the plaintiff is not entitled to receive and retain to her own uſe the whole of ſuch fines, then that it may be declared, in what proportion the fines ought to be divided and apportioned between plaintiff as tenant for life and the perſons entitled in remainder to the ſaid leaſehold eſtates.

Thomas Milles by his anſwer admitted, that the leaſehold eſtates of the teſtator were held by him under the Biſhop of *Waterford*; and that the Biſhop for the time being hath been accuſtomed to grant leaſes to the teſtator and thoſe, from whom he derived the ſaid leaſehold eſtates, for the term of twenty-one years; and that ſuch leaſes have been from time to time renewed at the old accuſtomed rents upon ſurrender of the exiſting leaſes and payment of fines; and that the teſtator had been accuſtomed many years before his death to make annual ſurrenders of the ſaid leaſes to the ſaid Biſhop, and to obtain from him new demiſes for the full term of twenty-one years; and that at the time of his death he had a term of nearly twenty-one years unexpired in the ſaid eſtates.

The teſtator underlet the ſaid eſtates to various tenants for terms of twenty years; and was accuſtomed from time to time to accept ſurrenders of the leaſes of his tenants, and to grant them new leaſes for the term of twenty years at the old rent, receiving from ſuch tenants fines proportioned to the value of the renewed terms of years; and that the under-tenants did not regularly apply for, and obtain ſuch renewals from the ſaid teſtator, as he renewed his own leaſes; but that occaſionally they ſuffered many years to elapſe, before they applied for and obtained renewals.

At the deceaſe of the teſtator many of his tenants held for terms of twenty years commencing in 1788; and other for the like terms, commencing in 1792; but none of their leaſes had been renewed ſubſequent to the year 1792.

The plaintiff and defendant have annually ſurrendered the ſubſiſting leaſes, and obtained renewals for the full term of twenty-one years and the old accuſtomed rent; and the plaintiff has paid the fines and fees of ſuch renewals.

The plaintiff and defendant have not renewed the leaſes of any of the under-tenants ſince the teſtator's death: but many of them have applied for that purpoſe; and offered to ſurrender their exiſting leaſes, and pay fines proportioned to the value of the renewed terms to be granted.

The defendant ſtated, that in his opinion it would be beneficial to the perſons intereſted in the ſaid leaſehold eſtates, that ſuch renewals ſhould be granted; and prayed the directions of the Court.

The queſtion was, how the fines to be paid upon the renewal of the underleaſes ſhould be diſpoſed of.

Mr. Richards and Mr. Hart for the plaintiff. Mr. Sutton and Mr. Kenrick for the defendants.

The decree declared, that the fines to be paid for renewals of the leaſes of the teſtator's leaſehold eſtates ought to be paid out of the rents and profits thereof; and the plaintiff *Roſe Milles* undertaking to pay the fines to be paid on the renewals of ſuch leaſes out of ſuch rents and profits it was declared, that ſhe as tenant for life of the ſaid eſtates is entitled to her own uſe to the fines to be paid by the under tenants of the ſaid eſtates upon the renewal of their reſpective leaſes during her widowhood; and it was ordered, that the defendant *Thomas Milles* ſhould join with the plaintiff in granting leaſes to ſuch of the reſpective tenants of the ſaid leaſehold eſtates as ſhall be deſirous of renewing their terms in the leaſes of their reſpective tenements.

1802.
March 18.

TEMPLE *v.* THE BANK OF ENGLAND.

Notwithſtanding the act of Parliament 39 and 40 *Geo.* 3. *c.* 36. the Bank of *England* may ſtill be made parties to a bill to reſtrain a transfer of ſtock, filed ſince that act.

A demurrer by the Bank was overruled.

THE bill ſtated, that *Elizabeth M'Rae* of *Jamaica*, being among other perſonal eſtate entitled to a large ſum in the 4 *per cent.* Bank Annuities, by her will, among other legacies, gave to *Richard Henry Temple* 2000*l.*: but in caſe of his deceaſe in her life ſhe gave the ſaid legacy of 2000*l.* to his ſiſter; and ſhe directed, that the ſaid legacy of 2000*l.* and ſome others ſhould be paid out of the monies ariſing or to ariſe or become due to her out of the ſaid 4 *per cent.* Bank Annuities; and the ſame was by the will made chargeable therewith; and ſhe appointed two perſons in *London* and two in *Jamaica* jointly or ſeverally executors.

The teſtatrix died in 1799. *Richard Henry Temple* died in her life. The executors in *England* proved the will; and poſſeſſed themſelves of the 4 *per cent.* Bank Annuities and other perſonal eſtate. The latter was more than ſufficient for the debts, funeral expences and legacies, except thoſe charged upon the Bank Annuities; and thoſe Annuities were more than ſufficient for the legacies charged upon them. The executors transferred the Bank Annuities into their own names.

The bill, which was filed on behalf of the infant ſiſter of *Richard Henry Temple* againſt the two executors, who had proved the will, and againſt the Bank of *England*, prayed, that the legacy of 2000*l.* may be raiſed by ſale of the Bank Annuities, and paid into the Bank, *&c.*; and that the defendants, the executors, may be reſtrained from transferring, and the Bank, from permitting them to transfer, the Bank Annuities.

To this bill the Bank put in a general demurrer.

Mr. Piggott and Mr. Wooddeſon in ſupport of the demurrer—The only queſtion is, whether ſince the late act of Parliament (*a*) the Bank can be made parties to a ſuit for this purpoſe, merely to prevent a transfer of ſtock. The act of Parliament has made it

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(*a*) Stat. 39 and 40 *Geo.* 3. *c.* 36.

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quite unneceſſary, that they ſhould be parties. A privilege was intended to the Bank as well as to the ſuitor. This caſe bears analogy to thoſe, in which the defendant has demurred as to diſcovery, on the ground, that having no intereſt he might be examined as a witneſs; or as to relief, that no decree can be had againſt him. The act has preſcribed a mode of relief without making the Bank parties. But it is objected, that the words of the act are optional and not imperative. The words of the third ſection are imperative; and as to the firſt the ſpirit of the law requires a ſimilar conſtruction. The words there are not imperative; becauſe it was not ſuppoſed, that plaintiffs would voluntarily incur unneceſſary trouble and expence. It would be the height of inconſiſtency, that ſuits already commenced ſhould be peremptorily diſmiſſed, but that new ſuits might be commenced. There are many inſtances in the conſtruction of acts of Parliament, in which words of permiſſion have been conſtrued imperative. There is an impropriety in making the Bank parties to ſuch bills and upon common occaſions. Such ſuits have been very numerous; and there may be abatements; and then there cannot be a reviver for coſts (*a*).

Mr. Pemberton for the plaintiff obſerved, that unleſs the words can be conſtrued to be imperative there was an end of the cauſe. The object of the Legiſlature was an accommodation to the public: but this is no accommodation; for inſtance, if an executor was about to transfer ſtock during the long vacation; as the application under the act can only be made, when the Court is ſitting. Upon an application to the Court of Exchequer under this act ſo much difficulty was found in proceeding under it, and ſo much expence likely to be incurred, that leave was given to amend the bill, and make the bank parties.

The plaintiff's counſel was then ſtopped by the Court.

Injunction in Chancery in the vacation: the Court being always open.

Lord CHANCELLOR—I am of opinion with the plaintiff; though very reluctantly. With reſpect to the objection, that has juſt been made, the Lord Chancellor could give an injunction in the vacation. The Court of Chancery is always open.

(*a*) See *Morgan* v. *Scudamore*, *ante*, vol. 3. 195.

But

1802.

Temple v. The Bank of England.

But I am of opinion, that the Legiſlature has miſſed this caſe. The right of the ſubject before this act was moſt clear, to file a bill to reſtrain a perſon from making a transfer of ſtock, and the Bank from permitting a transfer; and Lord *Kenyon* was of opinion, that notice to the Bank without more would operate as an injunction. That however it is not neceſſary to conſider: but the right to file a bill for this purpoſe before the act being clear, the queſtion is, whether the act has made it unlawful to make the Bank parties in that very caſe, in which it was before lawful. Nothing could be more eaſy than to do that; and in the third ſection the Legiſlature contemplate the cauſes then exiſting; and put an end *brevi manu* to all cauſes then exiſting: but they have not ſaid ſo as to future ſuits: whatever the intention might have been. The word "depending" in the firſt clauſe I take to mean "depending or that ſhall depend:" though that is not very accurate. The act looking proſpectively ſeems to contemplate either the caſes, in which the Court would grant an injunction by their own inherent powers, if the Bank was a party, or, if the Bank was not a party, by the powers given by this act. In many caſes words of this ſort have been conſtrued imperative, as has been urged. But this act in its language contemplating both caſes, where the Bank is a party, and where not, has not prohibited making them parties in future ſuits; though in terms prohibiting, that they ſhall be kept before the Court in depending ſuits. I may conjecture; but I have no authority to interfere, to take away what was before that act the right of the ſubject. At the ſame time I very much approve the demurrer put in by the Bank. The object of the act being to ſave expence, they have acted very honourably and laudably in taking the opinion of the Court.

Demurrer overruled (*a*).

(*a*) *The Attorney General* v. *Gale* in Chancery 23d *June* 1802.

The Bank being made parties under the deciſion of *Temple* v. *The Bank of England*, and the object, a diſcovery and to reſtrain a transfer, having been obtained, Mr. *Owen* moved to diſmiſs the Bank on payment of their coſts.

The Lord Chancellor ſaid, he underſtood, doubts had been intimated as to the deciſion in *Temple* v. *The Bank of England* and the caſe in the Court of Exchequer; but that having repeatedly thought of it ſince, he had not a particle of doubt in his mind of the propriety of that deciſion.

In *Hammond* v. *Maundrell*, 27th *Nov.* 1801, upon a bill by one reſiduary legatee and executor againſt the other, Mr. *Owen* made an application under the act of Parliament, to reſtrain a transfer of the fund without making the Bank parties, as a motion of courſe, without notice or affidavit; expreſſing at the ſame time a doubt, whether it ſhould be ſo; ſuggeſting however the danger of notice, and that previouſly to the act a ſubpœna had the effect of an injunction.

Lord Chancellor—The Bank never would admit that, even upon a ſubpœna and a bill filed. The doubt I have is upon the right of the defendants to contend, that I ought not to make ſuch an order; whether that act entitles me to make the order without hearing the defendant intereſted in the fund; whom before that act paſſed, when the Bank were made parties to the ſuit, I muſt have heard. You muſt previouſly to the act have given notice to that party, having an eſſential intereſt. Then the meaning of the act is, that you ſhould diſcuſs the point with the defendant; and then the order ſhould be made upon the Bank; though they are not parties. The miſchief you allude to is, that, unleſs you have a ſpeedy order, and without giving the defendant two days' notice, he may transfer in the mean time. But that exiſted before the Act; and the Court will apply the ſame remedy, if you come upon a ſpecial ground and affidavit, as upon a caſe in the nature of a bill to reſtrain waſte; leaſt the fund ſhould be transferred in the mean time. Suppoſe, the Plaintiff knew, that if the defendant could not transfer 10,000 *l.* next *Monday*, he would be ruined; and had a malice or an intereſt in his ruin. That miſchief is done by ſuch an application upon a falſe bill; as it may be, if without affidavit. It would therefore be a very dangerous precedent to reſtrain the Bank from transferring the money of a perſon, who is a party in the cauſe, without giving notice; unleſs where from the neceſſity and urgency of the caſe you could not give notice; but then the application muſt be upon affidavit verifying, that ſuch urgency and neceſſity exiſt.

Motion refuſed.

An application under the act 39 and 40 *Geo.* 3. *c.* 36. to reſtrain the Bank from making a transfer without making them parties, muſt be upon notice to the defendants, or on affidavit, as in caſes of waſte.

LLOYD v. LOARING.

March 18, 19.
May 13.

Demurrer to a bill by ſome members of a Lodge of Free-maſons againſt others to have the dreſſes and decorations, books, papers, and other effects, of the Society delivered up, and an Injunction, was allowed, on the ground, that they affected to ſue in a corporate character: but leave was given to amend: the Court holding juriſdiction for the delivery of a chattel, and, where there is a joint intereſt permitting ſome to ſue, as individuals, repreſenting the reſt, in other inſtances than thoſe of creditors and legatees; if inconvenient to juſtice, that all ſhould be parties.

This bill, filed by *Evan Lloyd* and two other perſons on behalf of themſelves and all other members of the *Caledonian* Lodge of Free Maſons, except the defendant *Loaring*, againſt *Loaring* and another perſon, ſtated, that plaintiffs are members or companions of a certain ancient fraternity, ſociety, or lodge of Free maſons, called or known by the name of the *Caledonian* Chapter No. 2., and being No. 2. on the liſt of the ſocieties of Royal Arch Free maſons, conſiſting of plaintiffs and a number of other perſons; and plaintiff *Lloyd* being the chief or principal officer, and the other two plaintiffs ſecretaries or other officers of the ſaid companion, chapter, or ſociety: plaintiffs as ſuch three officers, as aforeſaid, having the ſole management and direction of the affairs of the ſaid *Caledonian* chapter; which ſaid chapter has been duly certified, and the names of the members regiſtered according to law.

The bill further ſtated, that the ſaid chapter or ſociety held their meetings at the *Horn* tavern; and the dreſſes and decorations, and the books and papers, tools and implements, and other goods and effects, of the ſaid chapter or ſociety were there kept in a cheſt; the key of which was kept by *Lloyd*, as principal officer. A union with another chapter, called the Prudence Lodge, having been propoſed and aſſented to by the members then preſent, and that the future meetings ſhould be held at the Free maſons tavern, the defendant *Loaring* and four other members then preſent authoriſed the janitor or ſervant of the ſaid chapter to remove the ſaid property to the Free-maſons tavern; the maſter of which was directed to deliver it to him on producing the written order and in the preſence of *Lloyd*, and to no other perſon. The defendants afterwards went there; pretending authority from *Lloyd*; and that by miſtake he had ſent the wrong key; and they broke open the cheſt; and took away all the ſaid dreſſes, &c.

The bill further ſtated, that by the rules and condition of the ſaid ſociety it is neceſſary, whenever any of the buſineſs or ceremonies are to be tranſacted or performed, that the plaintiffs or one of them ſhould be preſent; eſpecially *Lloyd* as the preſident or principal officer; to whoſe care the key of the cheſt, and the effects, and the books, containing the laws and conſtitution and the accounts of the ſaid ſociety or chapter and the original warrant or charter are entruſted; and it is indiſpenſible, that he ſhould have poſſeſſion of them; without which the ſociety cannot properly be convened, or the buſineſs tranſacted; and the defendant *Loaring* is intereſted in, or has a ſhare in, the property veſted in him as a joint tenant with the other members; and having got the excluſive poſſeſſion of the ſaid effects, is a truſtee for the other members, and bound to reſtore them uninjured for the uſe of the ſociety.

The bill charged, that the plaintiffs took a *Bow-ſtreet* officer to the houſe of the other defendant *Hannam;* who acknowledged, that they had taken the property; and reſtored part of it, that was in his poſſeſſion; but that *Loaring* has the greateſt part, and in particular the books of the conſtitution, laws, and rules, of the ſaid chapter or ſociety, the books of account, names of the members, minutes of the proceedings, and the original warrant or charter, granted to them by the grand or head chapter of Royal Arch maſons; by which the *Caledonian* chapter is conſtituted or authoriſed and continued, and without which original warrant or charter no meetings of the ſaid chapter or ſociety can be properly and regularly convened or held, or the buſineſs or ceremonies, or functions, of the ſaid chapter or ſociety performed; that the perſons, by or from whom ſuch conſtitution and warrant or charter were granted, are all long ſince dead; and no conſtitution or charter can now be had; and if the ſaid conſtitution or charter or warrant ſhould be loſt or deſtroyed, the ſaid chapter or ſociety would either be wholly diſſolved, and loſe its rank and privileges among the ſeveral different lodges or chapters, or be prejudiced or degraded; that the defendant *Loaring* has threatened and intends to burn or otherwiſe deſtroy the property, and in particular the books and the original warrant or charter; and that plaintiffs are ignorant of the particulars, of which the property conſiſts; and the defendants refuſe to diſcover, *&c.*; whereby the plaintiffs cannot take any effectual ſteps at law.

The bill prayed a diſcovery; and that the defendants may be decreed to deliver up the ſaid articles uninjured or undefaced; and in the meantime be reſtrained from diſpoſing of, burning, or otherwiſe deſtroying, defacing, or injuring, them.

The defendants demurred generally to this bill for want of Equity, and alſo for want of parties.

Mr. Piggott and Mr. Wooddeſon in ſupport of the demurrer, contending, upon the firſt ground of demurrer, that the tranſaction ſtated by the bill was an indictable offence, and was ſo treated by the plaintiffs themſelves, and ſecondly, that the intereſt ſtated by the bill being joint, the plaintiffs could not file a bill on behalf of themſelves and all others, as in the caſe of creditors, were ſtopped

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by the Lord Chancellor; who aſked, how the plaintiffs could come into Court, having no corporate character.

Mr. Romilly and Mr. Roupel for the plaintiffs—Societies of this deſcription are entitled to the protection of the Legiſlature, and are recognized in the Act of Parliament againſt ſeditious meetings. *Fells* v. *Read* (*a*) is an authority in all points for this bill. This is no felony, as contended; for there is a jointenancy. This is a partnerſhip. As to the objection, that theſe perſons have not a legal, known, character, entitling them to ſue, not being incorporated, they do not ſue as a corporation, or affect a corporate character. They ſue as a voluntary ſociety, compoſed of individual members, and in their individual capacity, on behalf of themſelves and all the other members. What has that appearance is merely deſcription; and to ſhew, that they had complied with the Act of Parliament. In *Chancey* v. *May* (*b*) the objection, that they had not defined the purpoſes of their partnerſhip, was not taken; and in this caſe it was unneceſſary to do ſo.

As to the objection for want of parties, certainly with a few exceptions, as the caſes of creditors and legatees, ſuing on behalf of themſelves and all others, all perſons intereſted muſt be parties. But that rule is not imperative, as if impoſed by the Legiſlature: but it has been laid down by the Court, to prevent a multiplicity of ſuits, and do complete juſtice between all perſons having any intereſt. The Court will not adhere to that rule or any other, if the conſequence will be an abſolute failure of juſtice. In *Chancey* v. *May* the rule was diſpenſed with upon the ground, that it would be impracticable to make them all parties by name. In *Pearſon* v. *Belchier* (*c*) the objection would have applied juſt as in this caſe; for every perſon had a right to call for an account. The deciſion of that caſe certainly was on another ground, the delay. But no objection of that ſort was taken; though certainly the defendants threw every poſſible difficulty in the way; and that cauſe was a very long time depending in the Court.

Lord CHANCELLOR—If this is not a corporation, how could theſe five perſons remove theſe articles? *Loaring* himſelf had a

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(*a*) *Ante*, vol. 3. 70. (*b*) *Finch's Pre. Ch.* 592. (*c*) *Ante*, vol. 4. 627.

right to object to the propoſed junction. If I conſider them as individuals, the majority had no right to bind the minority. One individual has as good a right to poſſeſs the property as any other; unleſs he can be affected by ſome agreement. But how is this Court to take notice of theſe perſons as a ſociety? A bill might be filed for a chattel; the plaintiffs ſtating themſelves to be jointly intereſted in it with ſeveral other perſons: but it would be very dangerous to take notice of them as a ſociety, having any thing of conſtitution in it. As to the Statute referred to, the meaning was only to take them, provided they gave notice of their meetings, out of the operation of the Sedition Laws, not to acknowledge them. In this bill there is a great affectation of a corporate character. They ſpeak of their laws and conſtitutions, and the original charter, by which they were conſtituted. In *Cullen* v. *The Duke of Queenſberry* (a) Lord *Thurlow* ſaid, he would convince the parties, that they had no laws and conſtitutions. But there was an allegation, that he was individually liable. It is the abſolute duty of Courts of Juſtice not to permit perſons, not incorporated, to affect to treat themſelves as a corporation upon the Record. If the plaintiffs had ſtated ſimply, that they and ſeveral perſons were jointly intereſted, or even they on behalf of themſelves and others, provided it was manifeſtly inconvenient to juſtice to make them all parties, and ſtating this caſe as individuals, upon the principle of *Fells* v. *Read* it might be very proper. That this Court will hold juriſdiction to have a chattel delivered up, I have no doubt: but I am alarmed at the notion, that theſe voluntary ſocieties are to be permitted to ſtate all their laws, forms, and conſtitutions, upon the Record, and then to tell the Court, they are individuals. Then what ſort of a partnerſhip is this; for it is now admitted to be a partnerſhip? The bill ſtates, that they ſubſiſt under a charter, granted by perſons, who are now dead; and therefore, if this charter cannot be produced, the ſociety is gone. Upon principles of policy the Courts of this country do not ſit to determine upon charters granted by perſons, who have not the prerogative to grant charters. I deſire my ground to be underſtood diſtinctly. I do not think, the Court ought to permit perſons, who can only ſue as partners, to ſue in a corporate character; and that is the effect of this bill.

Demurrer allowed.

(a) The caſe of the Ladies *Coterie*.

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May 13.

The Lord CHANCELLOR, when the demurrer was allowed, having thrown out an intimation, that the plaintiffs might amend, Mr. *Romilly* and Mr. *Roupel* moved for leave to amend the bill.

Mr. Piggott and Mr. Wooddeſon for the defendants oppoſed the motion; inſiſting, that it would not be permitted in the caſe of any partnerſhip trade; that the deciſion in *Lord Coningsby* v. *Sir Joſeph Jekyll* (*a*) was not conſidered regular (*b*): at leaſt it is not of courſe, where the demurrer is not merely for want of parties; and that there is not a paſſage of this bill, in which the objection taken by the Court does not occur.

Lord CHANCELLOR—If the plaintiffs ſtrike out their preſent ſtile as plaintiffs, and ſue as individuals, they will appear as different perſons. I give them leave to amend, becauſe I am not ſure, I ſhould not contradict ſome rule; having had great doubt, whether I ſhould allow the demurrer. That doubt is founded upon this; that it has been decided, that individuals forming a voluntary ſociety may as individuals, not as a voluntary ſociety, have ſuch a joint intereſt in a chattel, that this Court would take notice of that intereſt, and of agreements upon it, not with reference to them as a voluntary ſociety, but as individuals. I allude to the caſe (*c*) I argued with ſucceſs upon the tobacco box. With reſpect to that deciſion I had conſiderable doubt, whether this very caſe would not ariſe out of it. I had great doubt, whether a voluntary aſſociation for the beſt purpoſe is to meet without the authority of a corporation, and make laws and ſtatutes, which have no authority, and then call upon this Court to adminiſter all the moral juſtice, that may ariſe upon the diſputes among theſe, in a ſenſe unauthoriſed, bodies. It is ſingular, that this Court ſhould ſit upon the concerns of an aſſociation, which in law has no exiſtence; and in that caſe, that this Court ſhould be ancillary to their agreements as to their toaſts, &c. I was much diſappointed with that caſe upon that part of it; though I never had a doubt as to the juriſdiction upon chattels between man and man. But it is too late to conſider that now.

(*a*) 2 *P. Will.* 300.

(*b*) See *Mitf.* 15. the note.

(*c*) *Fells* v. *Read*, *ante*, vol. 3. 70.

In this caſe, though I cannot diſguiſe from myſelf, that the whole record attributed more of a corporate character than I ought to permit a voluntary ſociety to put upon the record, yet I could not diveſt myſelf of this notion altogether; that, though they had aſſumed that character, yet upon the whole bill there was a caſe repreſented fairly of individuals with a joint intereſt, abſurdly repreſenting themſelves corporate; and I had doubt enough therefore, whether overruling the demurrer was abſolutely right. By giving leave to amend I thought I might enable them to reduce the record to that, which, it is admitted, might be made by a new bill. Suppoſe, Mr. *Worſcley*'s ſilver cup was taken away from the *Middle Temple*: the ſociety muſt ſome way or other be permitted to ſue; and this is really the ſame; for it is not material, what it is. Upon the whole therefore I thought it fair to let them amend by ſtriking out all that.

In the manuſcript notes I have ſeen ſtrong paſſages, as falling from Lord *Hardwicke*, that, where a great many individuals are jointly intereſted, there are more caſes than thoſe, which are familiar, of creditors and legatees, where the Court will let a few repreſent the whole. There is one caſe very familiar, in which the Court has allowed a very few to repreſent the whole world. (*a*)

Leave was given to amend.

(*a*) With reference to this the Lord Chancellor before alluded to the caſes of *The Opera Houſe*, *The Royal Circus*, and *Drury Lane Theatre*.

PYLE *v.* PRICE.

March 19.

Bequeſt to the teſtator's wife, if living at his deceaſe, provided ſhe continued his widow: but if ſhe ſhould die before his deceaſe, or afterwards marry again, then and in either of ſuch caſes to his father, "if he ſhall be living at the time of my deceaſe or of ſuch marriage "as aforeſaid; and in caſe he ſhall not be then living, I give and bequeath the ſame to my brother."

The father ſurvived the teſtator: but died before the marriage of the widow. Upon her marriage the brother entitled.

Demurrer *ore tenus*.

The bill ſtated, that *John Pyle* by his will, dated the 15th of *March* 1796, after directing the payment of his debts, &c. gave, deviſed, and bequeathed, all his monies, ſecurities for mo-

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ney, ſtock in trade, houſehold goods and furniture, plate, linen, and china, and other effects whatſoever, and of what nature or kind ſoever, that ſhould belong to him at the time of his deceaſe, unto his wife *Ann Pyle* if ſhe ſhould be living at the time of his deceaſe for her own uſe and to be entirely at her own diſpoſal, provided ſhe continued his widow: but if his ſaid wife ſhould happen to die before his deceaſe or being then living ſhould afterwards marry again, then and in either of ſuch caſes he directed that all his ſaid money, ſecurities, ſtock, houſehold furniture and other effects whatſoever as hereinbefore mentioned ſhould go to and be received and enjoyed by his father *Robert Pyle*, “ if he “ ſhall be living at the time of my deceaſe or of ſuch marriage as “ aforeſaid And in caſe he ſhall not be then living I give and “ bequeath the ſame unto my brother *Robert Pyle*,” his executors, adminiſtrators, and aſſigns.

The bill further ſtated, that the teſtator died ſoon after making his will; and in *July* 1800 his widow married the defendant *William Price*; and *Robert Pyle* the teſtator's father died ſome time after the death of the teſtator, and before the marriage of *Ann Pyle*; whereby the plaintiff, *Robert Pyle* the younger became entitled under the will to all the reſidue of the perſonal eſtate ſo forfeited by her marriage; and prayed an account, &c. accordingly.

The defendants *Price* and his wife put in a general demurrer to the diſcovery and relief.

Mr. Lloyd and Mr. Stanley in ſupport of the demurrer—One cauſe of demurrer is, that the contingency has not happened upon the clauſe in this will. The word “then” may apply to either event.

Another cauſe, which, the demurrer being general, muſt be alleged *ore tenus*, is, that if that queſtion is doubtful, there is a manifeſt want of parties: the perſonal repreſentative of the father not being a defendant. There is no authority requiring, that a demurrer for want of parties muſt ſtate the parties; and that propoſition is too general; for it may be out of the power of the defendant to name the party wanting; and the caſe of *Tourton* v. *Flower* (a) ſhews the contrary.

Mr. Horne in ſupport of the bill was ſtopped by the Court.

No general rule, whether a demurrer for want of parties muſt ſtate the parties.

Lord Chancellor—With reſpect to the cauſe of demurrer for want of parties, beſides the objection, that has been mentioned, to requiring the party to be ſtated, it may appear upon the bill, that the plaintiff knows the party. Perhaps there is not a general rule either way.

But upon the conſtruction of this will I am clearly and without any difficulty of opinion with the plaintiff. The other conſtruction makes great part of the will abſolutely unneceſſary: all, that follows the words "if he ſhall be living at the time of "my deceaſe" is abſolute ſurpluſage; and means nothing. Upon that conſtruction it was quite unneceſſary to put both contingencies; for if the father ſurvived the teſtator, he or his repreſentatives would have taken the whole, whether he ſurvived the marriage, or not. It would therefore have been ſufficient to have ſaid, in caſe his wife ſhould die before him, or afterwards marry again, it ſhould go to his father; and all the reſt is ſurpluſage. At the moment after the teſtator's deceaſe ſhe could not be married; and for that reaſon he there does not put the alternative.

Demurrer overruled.

(a) 3 *P. Will.* 369.

March 18. 20.

Ex parte LUND.

Witneſſes to prove the act of bankruptcy not having obeyed the ſummons of the Commiſſioners an order was made, that they ſhould attend the Commiſſioners.

The witneſſes ſummoned under a commiſſion of bankruptcy to prove the act of bankruptcy not having obeyed the ſummons, this petition was preſented; praying an order, that they ſhall attend the commiſſioners.

Mr. Manſfield and Mr. Pemberton in ſupport of the petition—This petition is new: but, conſidering the nature of the ſubject, there muſt be ſomewhere a power to compel the attendance of witneſſes to prove thoſe neceſſary circumſtances, without which the commiſſion cannot have effect. From the bond given by the petitioning creditor it follows of courſe, that he muſt have a right by ſome authority to call upon theſe perſons to prove thoſe circumſtances. A ſtrong implication alſo ariſes from the nature of a commiſſion of bankruptcy, requiring poſſeſſion of the effects to be taken as ſoon as poſſible; a ſpecies of execution. The law authoriſing ſuch a proceeding muſt authoriſe all the neceſſary ſteps for that purpoſe. Under Commiſſions of lunacy without any Act of Parliament or expreſs authority ſubpœnas, calling upon witneſſes to attend, are iſſued of courſe by the Commiſſioners; whoſe authority comes in the room of the eſcheator or ſheriff under the old writ (*a*). There is certainly this difference; that under that commiſſion a Jury is to inquire. But the power to ſummon witneſſes is only by implication; and becauſe without ſuch a proceeding it would be quite impoſſible to execute the commiſſion.

This petition ſtates, that the perſons ſummoned at firſt took an objection by Counſel, that the Commiſſioners had not qualified; which ſhews the ſpirit of reſiſtance and colluſion. No ſuch order as this petition prays can be found; but it ſtands upon analogy to what has been done in ſupport of orders and ſummonſes of the Commiſſioners. In *Ex parte Kerney* (*b*) no precedent was produced: but without any Lord *Hardwicke* took a ſtrong meaſure in aid of the power of the Commiſſioners; for no Statute gives a power of committing for a contempt of the Commiſſioners' ſummons.

The juriſdiction of the Lord Chancellor in bankruptcy is diſtinct from that of the Court of Chancery.

Lord Chancellor—There is great confuſion in the language of every book relating to the ſubject, ſpeaking of the Court of Chancery. The juriſdiction is not in that Court, but in the individual, who happens to hold the Great Seal, by a ſpecial commiſſion

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(*a*) The writ *De Idiota inquirendo et examinando*. See *Fitzh. Nat. Brev.* 530.

(*b*) 1 *Atk.* 54.

miſſion to iſſue Commiſſions of bankruptcy; and there is not therefore a neceſſary conſequence, that by that power the Lord Chancellor has in himſelf all compulſory powers of compelling all ſorts of witneſſes to attend. But very ſtrong acts have been done. The caſe, *Ex parte Kerney* and ſome others ſhew, that the Lord Chancellor in bankruptcy has taken upon himſelf to do very ſtrong acts; for according to the letter of the acts of Parliament, for any thing expreſſed in them, when once he has granted a Commiſſion, conſtituting the Commiſſioners the Court, he is *functus officio*. Yet in *Ex parte Kerney* Lord *Hardwicke* thought himſelf authoriſed, becauſe the Commiſſion iſſued under the Great Seal, to conſider the act as a contempt of the Great Seal, as if ſitting in the Court of Juſtice; and not only diſcharged the perſon arreſted, but ordered the other under the penalty of commitment to give ſecurity to anſwer interrogatories; directing him to be examined; as would be done in the Court of King's Bench upon a contempt. I will look in Lord *Hardwicke*'s notes for that caſe. In 2 *Black.* 1142. Lord *Northington* ſpeaking of this power is repreſented as uſing the ſame inaccurate language; ſpeaking of the powers of the Court of Chancery; which has nothing to do with it. Lord *Roſslyn* alſo diſcharged a perſon returning from being examined before the Commiſſioners (a); which muſt be under a notion, that it is a contempt of the Great Seal. Whether that is right, and the Great Seal having this ſpecial authority can conſider it as a contempt, as Courts do, ſtrictly ſpeaking, might have been doubted, if there was not all this authority. I do not lay much ſtreſs upon the bond; for in general the creditor is in poſſeſſion of the evidence: if not, he ought not to make the oath; and he never could be hurt by the bond; for it will not be aſſigned; unleſs the commiſſion is wilfully and maliciouſly taken out. The creditor taking out the Commiſſion generally ſuppoſes himſelf able to bring witneſſes to prove the act of bankruptcy; and it would be a ſufficient anſwer certainly to an application to have the bond aſſigned, that he was informed of the act of bankruptcy, &c. and could not get the witneſſes to attend. It will turn out, I believe, that the Great Seal has exerciſed authority analogous to this; and if ſo,

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(a) *Ex parte Parker, ante*, vol. 3. 554.

1802. Ex parte LUND.

Commiſſioners of lunacy have a power of ſummoning witneſſes as incident to their office.

I will not give up the authority. The Commiſſioners of lunacy came in the room of another authority; and were meant to have all the powers that authority had; and among thoſe there is reaſon to ſay, it muſt be incident to the office of Commiſſioner of lunatics to ſummon witneſſes. If a commiſſion of bankruptcy could not be executed without that power, it would be incident, I ſhould think, to the office of Commiſſioner; and if ſo, the queſtion is, whether it is in the perſon, who holds the Great Seal.

Some time afterwards the order was made for the attendance of the witneſſes (by name) before the Commiſſioners.

March 11. 18. 20.

DAVIES *v.* LEO.

Injunction to reſtrain waſte not granted without poſitive evidence of title.

MR. *Whiſhaw* for the plaintiff moved for an injunction to reſtrain the defendant from cutting any timber or other trees on the eſtates in the bill mentioned, planted or growing for ornament or ſhelter of the manſion houſe, park, and grounds, and any ſaplings, *&c.*

The affidavit of the plaintiff ſtated, that he had been informed, that *Lætitia Leo*, the late wife of the defendant *Daniel Leo*, of *Lannech* in the county of *Denbigh*, was at her marriage ſeiſed in fee ſimple of real eſtates in that county; which by a ſettlement previous to her marriage were limited to the uſe of *Lætitia Leo* for life; remainder to the defendant for life; remainder to the iſſue of the marriage therein mentioned; and in default of ſuch iſſue remainder to ſuch perſon or perſons as *Lætitia Leo* ſhould by deed or will notwithſtanding coverture direct or appoint; and in default of ſuch appointment with certain limitations over in favour of certain perſons therein named and their iſſue, and (amongſt others) of the deponent, her firſt couſin, and his iſſue in manner therein mentioned; with an ultimate limitation to the right heirs of *Lætitia Leo*. The marriage took effect; and *Lætitia Leo*,

having

having a power reſerved to her of executing a will as aforeſaid, did (as the deponent believes it is alleged by the defendant *Daniel Leo*), make and publiſh ſome writing or inſtrument purporting to be her laſt will and teſtament; which, as it is alleged by *Daniel Leo*, was duly executed; whereby ſhe limited and appointed the eſtates after the death of *Daniel Leo* in default of iſſue of the marriage unto and to the uſe of the defendant *Henry Leo* with remainder to his lawful iſſue in tail general; and, in default of ſuch iſſue, with remainder to the iſſue of *Daniel Leo* by any ſubſequent marriage in tail general; and, in default of ſuch iſſue, remainder to the deponent for life; remainder to his iſſue in tail general, and divers remainders over.

The affidavit farther ſtated, that *Lætitia Leo* died in *December* 1801 without having revoked or altered her ſaid alleged will, leaving her huſband, and leaving no brother, but leaving the defendant *Mary Puleſton* her only ſiſter and heireſs at law, ſurviving; that there has been no iſſue of the marriage; that *Daniel Leo* is unmarried; and that *Henry Leo* is an infant and unmarried; and the deponent believes, he has either under the ſaid ſettlement or the ſaid will and inſtrument a contingent intereſt expectant on the deaths of *Daniel Leo* and *Henry Leo* without iſſue: but never having been able to procure a ſight of the ſaid inſtrument he cannot at preſent ſtate his claim more particularly; that *Daniel Leo* has ever ſince the death of his wife been in poſſeſſion; and the deponent has been informed and believes, the ſaid defendant has in his cuſtody or power the ſaid ſettlement and the ſaid will or inſtrument: but he has not proved the will; and he has not produced the ſaid will or inſtrument, or furniſhed the deponent with any particulars reſpecting the ſame; whereby he is prevented from ſtating them more particularly.

The affidavit then ſuggeſted the intention to commit waſte; and that the defendant had ſurveyed, valued, and marked, trees, for ſale; and advertiſed.

The plaintiff by a farther affidavit ſtated, that *Lætitia Leo* did, as the deponent believes, make and publiſh ſome inſtrument, *&c.* (following the former affidavit); and that he grounds his belief upon the following information; that a few days after the death

of

of the teſtatrix the Reverend *William Davies Shipley*, whom the deponent believes to have been one of the truſtees in the ſaid marriage ſettlement and will, communicated the contents of the will to the Reverend *Samuel Strong* by letter with permiſſion to make the ſame known to the deponent; which letter was forwarded to the deponent in *London*; and was to the following effect; that by virtue of a power reſerved in the ſaid marriage ſettlement *Lætitia Leo* had made a will; whereby ſhe limited and appointed according to the limitations ſtated in the former affidavit; and upon receipt of that letter the deponent applied for an official copy of the will to *Hughes*, the Secretary of the Biſhop of *St. Aſaph*; who informed him, the will had never been proved; but that, as far as his memory ſerved, he would ſtate to the deponent the proviſions of the ſaid will, he himſelf having made a codicil thereto in 1796; and that the letter was to the ſame effect; except, that he, *Hughes*, did not well recollect, whether the ſaid eſtates in default of iſſue of *Daniel Leo* by a ſubſequent marriage were not limited to *John Davies*, uncle of the deponent, and his iſſue, as tenants in common, previous to the limitation to the deponent and his iſſue.

The motion was originally made upon the firſt of theſe affidavits.

Mr. Whiſhaw in ſupport of the motion—The Maſter of the Rolls doubted, whether this ſort of intereſt was ſufficient to entitle the plaintiff to an injunction of this ſort: but the practice has been to grant injunctions upon very general allegation of intereſt, to prevent irreparable damage, till anſwer or farther order. The plaintiff is the ſecond tenant for life in remainder; there being no tenant in tail *in eſſe*. Where the inheritance is to be affected, the general practice is to make all the tenants for life parties to a ſuit for any charge upon the eſtate. The Court will alſo attend to their intereſt for the purpoſe of protecting the eſtate from waſte. An injunction is granted in favour of the perſon entitled in reverſion or remainder generally; and formerly even without affidavits (*a*). That however is now overruled. The firſt tenant for life is entitled to it: *Roſwell*'s caſe (*b*); and,

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(*a*) *Prac. Reg.* 243, 244.

(*b*) 3 *P. Will.* 268. *n.* 1 *Roll. Ab.* 377. 3 *Atk.* 210.

according to what is ſaid in the note in *Peere Williams*, the heireſs at law is made a party to this bill. The principle extends to the ſecond tenant for life: *Perrot* v. *Perrot* (*a*).

Lord Chancellor—There is no poſitive affidavit, that the will was made, under which the plaintiff is next tenant for life to the defendant *Leo*. This is a mere hypothetical title, upon the plaintiff's information and belief, that a ſettlement was executed, under which *Leo* is tenant for life, and the plaintiff remainder man for life; leaving it in that way. There is no inſtance of an injunction in ſuch a caſe. Suppoſe, *Leo* was an old gentleman with five daughters; and having this right intended by the exerciſe of it to provide for them; and upon ſuch an affidavit, merely to belief, he is reſtrained for a year; and dies within that year! An affidavit to information and belief is nothing in this ſort of caſe. It muſt be irreparable miſchief to a perſon, who ſwears to his title. I cannot grant the injunction; unleſs a poſitive affidavit is produced.

Upon the other point, I have no doubt, a tenant for life may have an injunction, particularly as to ornamental timber; for that is not ſo much upon his intereſt as his enjoyment.

Injunction againſt waſte in favour of tenant for life; particularly as to ornamental timber; not ſo much upon his intereſt as his enjoyment.

March 18.

The motion was renewed upon the farther affidavit, above ſtated.

March 20.

Lord Chancellor—I dare not grant an injunction in this caſe. The bill ſtates a title ſufficiently, if it was duly verified. But the affidavits diſcloſe the caſe no farther than that it may or may not be true; and I am of opinion, the Court ought not to grant an injunction, unleſs there is poſitive evidence of actual title. If thoſe Letters are true, they can ſwear to the truth of them (*b*).

Motion refuſed.

(*a*) 3 *Atk.* 94.

(*b*) *Pillſworth* v. *Hopton*, *ante*, 51. *Smith* v. *Collyer*, *Poſt.*

1802.

March 18, 19, 20.

MOUNTFORD *v.* TAYLOR.

Bill by creditors by judgment, who had ſued out *Elegits*, for a diſcovery of freehold eſtates; charging, that the defendant upon his election as member of Parliament, previouſly to the judgments, gave in his qualification; and if the eſtates compoſing it were conveyed away ſince, it was without conſideration. Demurrer as to the qualification, &c., and anſwer to the reſt, but not going to the charge of conveyance without conſideration: the demurrer was overruled.

THE bill ſtated, that *John Mountford* brought an action againſt the defendant upon a bond for 425*l.*; and obtained a judgment in *Hilary* Term, 40 *Geo.* 3. *Mountford* died; leaving the plaintiff *Mary Mountford* his executrix; who revived the judgment.

The defendant being alſo indebted to the other plaintiff *Joſeph Sharp* for work and labour and goods ſold and delivered in the ſum of 85*l.* 10*s.* 3*d.*, *Sharp* brought an action; and obtained judgment in *Michaelmas* Term 41 *Geo.* 3.

The bill farther ſtated, that, when the judgments were obtained, the defendant was, and ever ſince hath been, or now is, ſeiſed for his own uſe of freehold eſtates for his life or ſome greater eſtate; that the plaintiffs ſued out writs of *Elegit* upon theſe judgments: but neither of them has been able to diſcover, where the eſtates of the defendant are ſituate; that they had frequently applied to the defendant, requeſting payment; or, that he would diſcover where his eſtates are ſituate, and who are in the occupation of them; in order that the plaintiffs might obtain ſatisfaction of their judgments by the *Elegits;* the defendant not having to their knowledge any perſonal property; and the plaintiffs are prevented from taking his perſon in execution by reaſon of his being a member of the Houſe of Commons, and having privilege of Parliament.

The plaintiffs then in anſwer to a pretence ſuggeſted, that the defendant was not at the time, when either of the judgments was obtained, nor hath been at any time ſince, nor is now, ſeiſed of or entitled to any freehold eſtates, charged, that the defendant in or about 1795 on being elected a member of the Houſe of Commons and on taking his ſeat took the oath as to his having the requiſite qualification in point of property; and that he then had ſuch an eſtate in Law or Equity to or for his own uſe and benefit in lands, tenements, or hereditaments, clear of all incumbrances, as was of the annual value of 300*l.* above reprizes, and as qualified him to be elected and returned a member of Parliament; and he alſo delivered to the Clerk of the Houſe of Commons or ſome other officer of the Houſe a ſchedule, containing the particulars of the eſtate, whereby he made out his qualification; and the plaintiffs are unable to obtain the ſaid ſchedule: but the defendant has or lately had ſome copy thereof, &c.; and ſuggeſting another pretence by the defendant, that he has ſince conveyed the eſtates, of which his qualification was compoſed, and a refuſal to diſcover, when, to whom, or for what, charged, that, if the defendant has ſince conveyed away the eſtates, which conſtituted his qualification, ſuch conveyance was without conſideration and in truſt for himſelf.

The bill prayed a diſcovery.

The defendant put in a demurrer and anſwer; ſtating, that as to ſo much of the bill as ſeeks a diſcovery from the defendant, whether he did not on the occaſion of his being elected a member of the Houſe of Commons or taking his ſeat take the oath as to his having the requiſite qualification, &c., or deliver to the Clerk or other officer of the Houſe a ſchedule, &c., and whether ſuch ſchedule was not ſigned by him, and whether the plaintiffs are not unable to obtain that ſchedule, and whether the defendant has not ſome copy thereof, &c. and as requires him to ſet forth ſuch copy, &c. or to ſet forth in the beſt manner he is able the particulars of the eſtate, in reſpect of which he made out his qualification, where ſituate, in whoſe occupation, and what right or intereſt he had at the time of his ſaid election in ſuch eſtates, and to ſet forth when, and upon what occaſion, to whom, and for what conſideration, and with what view, and for what purpoſe he ſo conveyed the ſame, and the date, &c. and material contents of the ſaid conveyance or conveyances, the defendant demurred; for cauſe, that the complainants have not ſhewn any right or title to have ſuch diſcovery from the defendant.

In anſwer to the reſt of the bill the defendant admitted the bond and judgment, the death of *Mountford*, and that the plaintiff *Mary Mountford* is his executrix; that ſome debt is due to the plaintiff *Sharp*; and that he obtained judgment. The defendant denied, that he was at the reſpective times, when the judgments

were

1802.

Mountford *v.* Taylor.

were obtained, or ſince, or is now, legally or in any other manner ſeiſed of, or legally or equitably or beneficially entitled for his own uſe and benefit to, any freehold meſſuages, lands, &c., for his life; or that he or any perſon in truſt for him hath any other eſtate or intereſt therein. He admitted the applications and refuſal; that he was elected a member of the Houſe of Commons in 1797; and that in conſequence of his being a member thereof and having privilege of Parliament the complainants are prevented from taking him in execution.

Mr. Manſfield, Mr. Romilly, and Mr. Pemberton, in ſupport of the demurrer—The object of this bill is idle curioſity. No creditor has a right to make theſe inquiries. The right of a creditor in the common caſe to a diſcovery of the real eſtate is admitted. But this defendant has poſitively ſworn, he has no real eſtate; and clearly is not bound to anſwer theſe impertinent queſtions. They aſk, whether the defendant had eſtates at a certain time, long before they recovered their judgments. They can have no intereſt in thoſe eſtates. There is a poſitive and direct anſwer, that he was not ſeiſed of or entitled to any eſtate of freehold in Law or Equity at the time the plaintiffs obtained their judgments, or ſince. No inference ariſes from the fact, that the defendant was a member of Parliament; for the Statute (a) ſays expreſsly, that the qualification may be copyhold eſtate; and it has been decided by the Houſe of Commons, the only competent tribunal, that a rent-charge would do. Neither of theſe could be touched by creditors.

Another objection is, that this diſcovery might ſubject the defendant to an Indictment for perjury; and avoid his ſeat under the act of Parliament.

Mr. Johnſon in ſupport of the bill—The anſwer to the laſt objection is, that is not the cauſe of demurrer aſſigned; which muſt be abandoned, before the defendant can aſſign another *ore tenus*. But upon the nature of the caſe it is impoſſible for the defendant to protect himſelf by that allegation, that he has ſworn falſely: the bill charging, that he had taken the oath, and that it is true,

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(a) Stat. 9 *Ann*, c. 5.

The general right of the creditor to come for a diſcovery of real eſtate in aid of his execution is admitted. The creditor then has a right to put any particular queſtions, the tendency of which may be to procure him that information. The general denial is not ſufficient. If a bill was filed for a diſcovery of the conſideration of a ſecurity and a variety of particulars with reſpect to that, the defendant ſwearing broadly, that he paid full conſideration, cannot protect himſelf from anſwering the particulars. The plaintiffs have a right to aſk as to the anterior time, to avail themſelves, if they can, of that diſcovery againſt the perſons, in whoſe poſſeſſion the eſtates may now be. The fact of his election and taking the oath is produced as evidence, that he had freehold eſtates, and that he has not ſince parted with them, or has parted with them in ſuch a manner, that the plaintiffs are not deprived of their lien.

Mr. Manſfield in reply—The plaintiffs might perhaps aſk the defendant, whether he had any eſtates, which he has conveyed in truſt for himſelf. This demurrer does not go to ſuch an inquiry, but only to inquiries, which are wholly impertinent, as to the qualification, what paſſed in the Houſe of Commons, and what he has done with the eſtate he gave in. Is he bound to ſet forth, what is become of any eſtate he had twenty years ago? It is enough in explicit terms poſitively to deny, that he ever executed any conveyance of ſuch eſtates in truſt for himſelf; and that he has any intereſt legal or equitable in any eſtate, upon which execution may be had by a creditor.

Lord Chancellor—This is as important a caſe as ever came before the Court; not with regard to the particular circumſtances belonging to it, but as to the general principle, which muſt govern all caſes of the ſame kind, though not preciſely of the ſame ſpecies. I muſt take it, that in 1797 the defendant had an eſtate of 300*l.* a year; ſubſequent to which time the judgments were obtained. It ſeems admitted, that they have a right to come here for a diſcovery, where the property is, in order to make their judgments available. That certainly will not affect real property had, before the judgment was obtained, if no longer under ſuch circumſtances that the creditor can follow it: but it does not follow, that he cannot, merely becauſe it does not remain in the ownerſhip of the debtor; for there may be many caſes, in which he might. There is a material charge in this bill; that, if there was any conveyance, it was without conſideration. Firſt, in the common caſe will a bill for diſcovery lie, with all this particularity, to know every eſtate he has ſold and diſpoſed of for three years? If ſo, he may go back forty years. The very defence in this caſe ſuppoſes, the plaintiffs have a right to call upon the defendant at leaſt to negative ſome general inquiries. The policy of the proceedings in this Court is, that a general denial is not enough; but there muſt be an anſwer to ſifting inquiries upon the general queſtion. There is a difficulty upon the objection, that this would extend to an eſtate parted with forty years ago without conſideration; and I am not quite clear, that ſuch a bill muſt not allege, that at a given time the defendant was ſeiſed of given lands; (not ſimply ſuggeſting as a fiſhing bill, that at ſome time or other he had ſome land); and that he conveyed thoſe lands away fraudulently, to put them out of the reach of this creditor.

General denial not enough: there muſt be an anſwer to the ſifting inquiries upon the general queſtion.

March 20.

Lord Chancellor—This demurrer muſt be overruled. The bill is met by a defence, admitting, that it is a proper bill; and the anſwer does not negative all, that is material to be anſwered. With reſpect to the nature of the qualification, if he had ſaid, the property he gave in to the Houſe of Commons was not liable to execution, the Court ought to be content with that, without requiring from him more particularity. But the bill charges, that the defendant delivered in a ſchedule of the particulars of the eſtates, whereby he made out his qualification, and that he has conveyed them without conſideration, as evidence, that he has lands liable to execution; as they may be unqueſtionably. Upon that I think he muſt anſwer.

Demurrer overruled.

1802.

Rolls.
March 23.

KENWORTHY *v.* BATE.

Power of appointing real eſtate well executed by a deviſe to truſtees to ſell, and an appointment of the money produced by the ſale.

Settlement upon ſuch child or children as the father ſhould appoint: appointment excluding one eſtabliſhed.

BY indentures of ſettlement, dated the 29th of *September* 1753, in conſideration of the marriage of *Bartholomew* and *Ann Penny* eſtates of *Bartholomew Penny* were conveyed to truſtees and their heirs, to the uſe of *Bartholomew Penny* for life; remainder to the uſe of *Ann Penny* for life, for her jointure and in bar of dower; and immediately after the deceaſe of the ſurvivor of them then to the uſe of ſuch child or children of ſaid *Bartholomew Penny* on the body of ſaid *Ann* his wife begotten or to be begotten as he ſaid *Bartholomew Penny* ſhould in and by his laſt will and teſtament in writing under his hand and ſeal duly executed give, direct, limit, and appoint; and, for want of ſuch direction, limitation, and appointment, to the uſe of the firſt ſon of the body of *Bartholomew Penny* on the body of ſaid *Ann*, *&c.*, and the heirs of the body of ſuch firſt ſon; with ſimilar remainders to the uſe of the ſecond, third, fourth, and all and every other, ſon and ſons ſucceſſively, and remainders over; with the ultimate remainder to *Bartholomew Penny* and his heirs.

Bartholomew Penny, having ſurvived his wife, died in 1798; having had by her, beſides other children who died under age and unmarried, three ſons and two daughters: *viz. Thomas George Penny*, *William Theyer Penny*, *Elizabeth Mary Guillandeau*, *Ann Aubert*, and *Bartholemew Penny*. By his will, dated the 10th of *December* 1795, reciting the ſettlement and the power therein contained, he gave, deviſed, and bequeathed, all the eſtates ſo ſettled and all the reſt and reſidue of his eſtates real and perſonal to *James Bate* the elder and *James Bate* the younger, to ſell and diſpoſe of the eſtates above mentioned as ſoon as convenient after his deceaſe; and the net produce thereof together with the net produce of the remainder he ſhould die poſſeſſed of he willed to be divided among his children; and he thereby gave to his ſon *Thomas George Penny* one ſhilling, to be paid within twelve months after his deceaſe; to his ſon *William Theyer Penny* 500*l.*; to his daughter *Elizabeth Mary Guillandeau* 500*l.* for her ſole and ſeparate uſe. The reſt and reſidue of all his effects he willed to be divided into four equal parts; and he gave one fourth thereof to

William Theyer Penny, one fourth part thereof to *Elizabeth Mary Guillandeau* for her ſeparate uſe; one fourth part thereof to *Ann Aubert* for her ſole and ſeparate uſe; and the remaining fourth part to *Bartholemew Penny*.

Bartholemew Penny, the youngeſt ſon, died in the life of his father. In *December* 1799 *William Theyer Penny* became a bankrupt; and the bill was filed by his aſſignees; ſuggeſting, that *Thomas George Penny*, the eldeſt ſon, went to the *Eaſt Indies* in 1772, and for upwards of twenty-ſeven years had not been heard of; and praying, that if the Court ſhall be of opinion, that the eſtates are unappointed, the defendant *Bate* may be decreed to deliver up the ſettlement; and that a Receiver may be appointed, &c.

The defendants inſiſted, that the will of 1795 was a good execution of the power; and that by a prior will, dated the 1ſt of *November* 1792, the teſtator gave, deviſed, and bequeathed, all the ſettled eſtates to *Elizabeth Mary Guillandeau* and her heirs for ever; and ſhe inſiſted, that if the will of 1795 was not a good execution of the power, the will of 1792 was not revoked thereby; or, if revoked as a will, it was good as an inſtrument of appointment.

Upon an inquiry directed the Maſter's Report upon the circumſtances ſtated, that *Thomas George Penny* died in 1775 without iſſue.

Mr. Romilly and Mr. Roupel for the plaintiffs—The intention is plain, that this eſtate was intended to go as real property, as far as it could. There is no authority, that a power of appointing a real eſtate is well executed by ſelling it and diſpoſing of the money. No caſe bears the leaſt reſemblance to this, except *Long* v. *Long* (*a*); which is very diſtinguiſhable in ſeveral circumſtances. *Thwaytes* v. *Dye* (*b*) will be cited. But there is a material difference; that there the party did not deviſe the eſtate away from all his children; but ſuffered it to go to the eldeſt in tail; giving rent-charges out of that eſtate to the others. In *Roberts* v. *Dixall* (*c*) alſo the eſtate went to one of the children.

(*a*) *Ante*, vol. 5. 445. (*b*) 2 *Vern.* 80. (*c*) 2 *Eq. Ca. Ab.* 668.

Mr. Richards, *Mr. Steele*, *and Mr. Stanley for the defendants*—This was a power veſted in the huſband, to enable him to provide for the children of the marriage; therefore to be conſtrued favourably. In *Long* v. *Long* there was equally an intention to continue the eſtate real: the limitations being to the firſt and other ſons, *&c.* But no intention was inferred from that circumſtance: the father having a right to appoint to one in fee; and the child might ſell the eſtate. In effect that, which ariſes from the land, is equally the ſubject of appointment, as a rent-charge. In *Thwaytes* v. *Dye* there is no difference from the circumſtance, that the land is permitted to go to one of the ſons. That caſe is an authority, that under a power of this kind the eſtate may be charged. Is that an execution *modo & formâ* within the terms of the power? In *Roberts* v. *Dixall*, which was the caſe of a mere naked power, the language of the Court ſhews, that this is a good execution. In Equity the intention is to be looked to. The eſtate is all the beneficial intereſt in it. Can the introduction of truſtees vitiate the whole? Either this is a good appointment, or not. The father might have given the eſtate or any portion of it to any one child immediately. Where is the difference between giving the produce, and giving the eſtate, to make produce of it? *Long* v. *Long*, though certainly differing in circumſtances, in principle governs this caſe; and was ſtronger; for the eſtate was to be limited to the eldeſt ſon ſubject to a charge. Suppoſe, a mine had been diſcovered: he might take the eſtate; paying the charge. It was contended there, that if for any reaſon he wiſhed to keep the eſtate, he might have done ſo, paying the charge: but the Lord Chancellor would not diſturb it, the ſubſtance being executed. In *Wilſon* v. *Piggott* (*a*) the principle is laid down correctly by Lord *Alvanley*; that where the party has ſuch a power, and demonſtrates an intention to give a ſhare to any child, the Court will enforce it without attention to the mode, in which it is given (*b*). It is clear, that under ſuch a power it is not neceſſary to give a ſhare to all: but it may be given to any one, excluding the reſt: *Swift* v. *Gregſon* (*c*), *Spring* v. *Biles* (*d*). The Court will conſider, whether the party has ſubſtantially executed. The motive, providing for a family, ought to be liberally con-

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(*a*) *Ante*, vol. 2. 351. (*b*) *Ante*, vol. 2. 355. (*c*) 1 *Term Rep. B. R.* 432.
(*d*) 1 *Term Rep. B. R.* 435. note.

ſtrued. A diviſion of a real eſtate into ſmall portions would be attended with great inconvenience.

But if this is not a valid execution of the power, then the former will muſt ſtand.

Mr. Romilly in reply—The will of 1795 is certainly a revocation of every other execution of the power by will. It is impoſſible, that this can be a good execution of the power at Law. The utmoſt, that can be contended, is that the father having in ſubſtance done what he was entitled to do, the parties are entitled to the aſſiſtance of a Court of Equity. In the caſes cited the legal eſtate was in the eldeſt ſon with the charges upon it. *Long* v. *Long* was thought a doubtful caſe; and there was no determination like it before. The Lord Chancellor went very much upon this; that the huſband had a power to charge portions for the younger children to what extent he pleaſed, even to the value of the whole eſtate except the ſum of 100*l.*; leaving no more than that for the eldeſt ſon; and therefore in ſubſtance he might have taken it from the eldeſt ſon. There was no limitation of the ſum to be charged. A power of charging to any extent is the ſame as a power to give the whole. That power was ſo executed, that, if good at all, it was good at Law: but this teſtator has attempted under the power to give to mere ſtrangers.

The Maſter of the Rolls—It does not appear, that this caſe in ſpecie has ever occurred: but in principle I cannot diſtinguiſh it from thoſe, that have been cited. Three of thoſe caſes muſt have been ill decided, if it is true, that ſubſtantially a power to appoint land can be executed in no other way than by limiting the land itſelf. In *Thwaytes* v. *Dye* the limitation was preciſely the ſame as this: the power was to appoint the land itſelf; and the argument aroſe as much as it does here, that beyond that the party could not go; that there was no election, except to do nothing or to give the land. He had a power to give the land: but he gave them nothing in the land; but inſtead of that made the diſpoſition ſtated in the Report. The objection was taken in the words, in which it is taken here. That was not a caſe in which he had directed a ſale: but the effect of the deciſion, which was upon a plea, goes the length of ſhewing, that a power to appoint land may in ſubſtance be executed without giving the land itſelf. If the heir's objection was a good one, it would have prevailed undoubtedly.

Power to appoint land well executed by a charge.

In *Roberts* v. *Dixall* alſo the power was to appoint land. The party did not appoint the land; but charged a ſum of money upon the land; and it was held ſubſtantially an execution of the power. It was not contended to be ſo literally and formally. As an illuſtration of that Lord *Hardwicke* ſaid, he might have directed a portion of the land to be ſold, and the money to be paid to his daughters; and what he did was equivalent.

Power to charge includes a power to ſell.

The caſe of *Long* v. *Long* determines this; that to enable a perſon to ſell land it is not neceſſary to have that authority expreſsly given to him. There the party had no right to ſell, but had a right to charge. That was a ſtronger caſe than this; for a power to charge is in its nature a more circumſcribed power than a power to give land. In this caſe there is an abſolute power to give the fee ſimple, the whole, out and out, to any one of the children, or to divide it among them. That is a more extenſive power; for the implication from a charge is generally, that ſomething is to be left. The terms of the ſettlement in the other caſe gave room in a peculiar degree for that implication; for it might be contended, that was only a power to charge; and the eſtate was to be in the poſſeſſion of the eldeſt ſon. Of neceſſity it was to be implied, that the eſtate was to be permitted to remain in the eldeſt ſon, to bear the charge; and therefore nothing but a charge could be intended. But it was held, that as there was nothing to reſtrain him in the amount, and he might have charged the utmoſt value, he had done only what was equivalent to that; and if the argument as to the eldeſt ſon's receiving 100*l.*, that it amounted to the ſame as if the charge had been to the full value except 100*l.*, is uſed, what is the argument here? The concluſion there was, that therefore he might ſell the land; and give the ſon 100*l.*, inſtead of permitting land of that value to continue in his poſſeſſion. It was ſuppoſed, he had all he was entitled to, if he had in money all he could have claimed in land. That is therefore a direct determination, that a power to charge includes a power to ſell. Then, does not a power to

give

give include a power to ſell for the purpoſe of giving the money inſtead of the land? It is impoſſible not to collect from theſe caſes a principle, that will bear out what is contended by the defendants; though the caſe has not preciſely occurred in terms.

Power to appoint land well executed by a charge.

Declare the appointment well made, *&c.*

March 24.

LANE *v.* WILLIAMS.

The MASTER OF THE ROLLS for the LORD CHANCELLOR.

Motion under ſpecial circumſtances upon affidavit before anſwer to reſtrain proceeding under a judgment refuſed.

MR. *Romilly and Mr. Thomſon for the plaintiff* moved for an injunction to reſtrain the defendant from proceeding at law upon a judgment obtained twenty-four years ago, and that the bond, upon which it was obtained, ſhould be depoſited with the Maſter; upon affidavit, ſtating, that the defendant, a tailor, was in the habit of ſupplying young men with money, ſelling horſes to them, and dealing in other tranſactions of a ſimilar nature; that the plaintiff had borrowed money from him; and incurred a debt of between 500 *l.* and 600 *l.*, for which the bond and judgment were given; part of the conſideration being paid in clothes; and that the judgment had been long ſatisfied: another ſecurity being given.

For the plaintiff *Patrick* v. *Harriſon* (*a*) was mentioned; where the negotiation of a bill of exchange was reſtrained.

Mr. Johnſon for the defendant—Except in the caſe of waſte and caſes analogous there is no inſtance of reſtraining a proceeding at law before anſwer, or until the defendant is in contempt for not putting in an anſwer. *Patrick* v. *Harriſon* was analogous to the caſe of waſte. This is a very different caſe. What ground is there for depoſiting the bond with the Maſter. It is impoſſible to reſtrain the defendant from proceeding to execution upon affidavit immediately on filing the bill. It is againſt all the courſe of the Court.

(*a*) 3 *Bro.* C. C. 476.

Mr. Romilly in reply—Certainly this application is not made upon the general practice, but upon the particular circumſtances, ſtated in the affidavit; to which no anſwer is made. The queſtion is, whether under theſe circumſtances, the judgment twenty-four years ago, and no proceeding ſince, this Court will juſt on the eve of the vacation, when there will be no opportunity to ſtay the proceeding, permit him to have the benefit of it.

The Maſter of the Rolls—Is there any inſtance, where the Court under any circumſtances interfered upon affidavit to reſtrain a legal right?

Mr. *Romilly* mentioned *Iſaac* v. *Humpage* (*a*).

Mr. Johnſon—That is a ſingular caſe; and the determination has been queſtioned. But it was upon the ground of fraud.

The Maſter of the Rolls—It was a caſe of colluſion.

I am afraid to make the precedent in ſuch a caſe as this. Here is a judgment; and *primâ facie* every man, who has a judgment, has a right to ſue out execution. It would be a very ſtrong thing to interfere to prevent the legal conſequences of a judgment.

Motion refuſed.

(*a*) *Ante*, vol. 1. 427. 3 *Bro. C. C.* 463.

BLUNT *v.* CLITHEROW.

Rolls.
1803
Nov. 30.
Dec. 21.
1802.
March 25.

A Receiver is not to lay out money in repairs at his own diſcretion: but under circumſtances an inquiry was directed; and the report ſtating, that the expenditure was for the laſting benefit of the eſtate, and by the direction of the truſtees, the order for the allowance was made.

A PETITION was preſented by the receiver appointed by the Court of the rents and profits of eſtates deviſed to the plaintiff, an infant; praying, that the Maſter may be directed to allow the petitioner the following ſums: 155*l.* 12*s.* 11½*d.* for maſon's and plaiſterer's work; 165*l.* 11*s.* 10*d.* for carpenter's

1802.

BLUNT v. CLITHEROW.

work; and 140 *l.* allowed to a tenant to complete other inſide repairs, done to a houſe, the late reſidence of the teſtator, and part of the ſaid eſtates: the Maſter having declined to allow theſe charges in paſſing the receiver's accounts without the ſanction of the Court.

The petition ſtated the following facts, verified by the affidavit of the petitioner; that theſe ſums had been really and *bonâ fide* paid and allowed by the petitioner for the ſaid repairs; and that the ſame were in the opinion of the petitioner neceſſary and proper; in order to render the houſe and premiſes tenantable; and a principal part of the repairs was made, or agreed to be made, previouſly to the appointment of the petitioner as receiver, by the direction and under the inſpection of the truſtees, to whom the eſtates were deviſed. The petition farther ſtated, that the truſtees had agreed to let houſe to a reſpectable tenant during the infancy of the plaintiff at a Rent of 180 *l. per annum*; and that the tenant was induced to take the houſe by the ſaid ſums being agreed to be laid out in the repairs.

Mr. Raynsford for the truſtees conſented to the prayer of the petition.

The Maſter of the Rolls expreſſed a ſtrong opinion, that he could not make ſuch an order; but permitted it to be mentioned again, if any precedent could be found.

Dec. 21.

Mr. Kenrick in ſupport of the petition—An order was made upon the 17th of *November* 1801, by the Maſter of the Rolls on the petition of a receiver in the caſe of *Croſs* v. *Omerod*; by which the Maſter was directed to inquire into a payment by the receiver of 2206 *l.* in diſcharge of a mortgage, funeral expences and legacies; which the Maſter had declined to allow the receiver.

An order was alſo made by Lord *Roſslyn*, as of courſe, without even ordering the parties to attend him, referring it to the Maſter to inquire into ſums expended by a committee in repairs of a lunatic's eſtates, and the propriety of future repairs. In *Garland* v. *Garland* a ſimilar order was refuſed: the receiver having perſiſted in expending large ſums in repairs, after prior ſums had been allowed him in paſſing his accounts with a caution from the Maſter not to lay out any more. There is alſo an order in Mr. *Newport*'s lunacy referred to by Lord *Roſslyn* (*a*). As to the repairs having been done by direction of the truſtees, *Inwood* v. *Twine* (*b*), *Lord Winchelſea* v. *Norcliffe* (*c*), *Vernon* v. *Vernon* (*d*). The only authorities containing any thing in oppoſition to the prayer of this petition are *Fletcher* v. *Dod* (*e*) and *Morris* v. *Elme* (*f*); amounting to nothing more than extrajudicial *dicta* as to this point. If the only object of the Court is to have a hold over receivers, and to prevent a wanton, intereſted, or extravagant, expenditure, that object is more likely to be obtained, and with leſs expence, by a courſe neceſſarily bringing before the view of the Maſter ſuch expenditure, than by putting the parties to the expence of a petition to obtain a previous order to conſider of the propriety of the expenditure; when even after that the accounts muſt again come before the Maſter.

Dec. 21.

The Maſter of the Rolls refuſed to make the order prayed; but referred it to the Maſter to inquire into the circumſtances of the expenditure of the ſaid ſeveral ſums; and whether the ſame was for the laſting benefit of all the parties entitled to the ſaid eſtates; with liberty to ſtate all ſpecial circumſtances.

March 25. 1802.

The Maſter by his Report ſtated the ſeveral facts contained in the petition to have been verified by affidavit; and that the truſtees admitted, that the repairs were done by their directions; that the manſion houſe and land adjoining had been let, as ſtated in the petition; and that it probably would have remained untenanted, if ſuch repairs had not been done; and that in his opinion the expenditure was for the laſting benefit of the eſtate and the parties intereſted therein: and a petition was preſented to confirm the Report.

(*a*) *Ante*, vol. 2. 72. (*b*) *Amb.* 417. (*c*) 1 *Vern.* 435.

(*d*) Before Lord *Thurlow*. Cited, *ante*, vol. 1. 456. in *Ex parte Bromfield*.

(*e*) *Ante*, vol. 1. 85. (*f*) *Ante*, vol. 1. 139.

Mr. Kenrick in ſupport of the petition to confirm the Report was ſtopped by the Court.

The Maſter of the Rolls ſaid, as it was now aſcertained, that the repairs were done by the direction of the truſtees, he would make the order: but Receivers muſt underſtand, that they are not to be permitted to lay out money in repairs at their diſcretion.

April 26.

FORD *v.* ———.

Order upon the Regiſter of the Conſiſtory Court to deliver original wills, for the purpoſe of being produced at the hearing, on ſecurity.

MR. *Stanley* moved, that the Regiſter of the Conſiſtory Court of *Durham* may be ordered to deliver ſeveral original wills for the purpoſe of being produced at the hearing of the cauſe upon receiving ſecurity.

The Lord CHANCELLOR ſaid, there was ſo much authority for the application, that he could not refuſe it; and that he had found a caſe among Lord *Hardwicke*'s notes: but his Lordſhip expreſſed his ſurpriſe, that ſuch a juriſdiction ſhould have been exerciſed. (*a*)

Ordered.

(*a*) *Hodſon* v. ———, *ante*, 135.

April 27.

Ex parte ROSS.

Money paid by order of a Friendly Society from time to time upon notes carrying intereſt, there being no treaſurer appointed, is not money in the hands of the party by virtue of any office within the Act of Parliament 33 *Geo.* 3. *c.* 54. *ſ.* 10., entitling the ſociety to a preference in caſe of bankruptcy.

THE petition, preſented by the preſident and ſtewards of a friendly ſociety under the act of Parliament (*a*), prayed, that the aſſignees under a Commiſſion of Bankruptcy may pay the ſum of 334*l.* 4*s.*; which the bankrupt *Dawſon* had in his hands as treaſurer at the time of his bankruptcy, either out of the joint or ſeparate eſtate.

(*a*) Stat. 33 *Geo.* 3. *c.* 54. *ſ.* 10.

Upon the affidavits it appeared, that no treaſurer had been appointed by this ſociety. The preſident and ſteward were choſen annually. The bankrupt had ſerved the offices of preſident and ſteward in different years. In the latter capacity he had received the money of the ſociety; but not in the former. The money, which was the ſubject of this petition, was from time to time paid to him by the ſtewards and clerks by the order of the ſociety upon promiſory notes, bearing intereſt, given by him in the name of the partnerſhip to the preſident and ſtewards; and upon a change in the partnerſhip by taking in his ſons the ſecurity was changed.

The queſtion was, whether under theſe circumſtances this caſe was within the act of Parliament.

Mr. Cox in ſupport of the petition—Though by the rule of this ſociety no treaſurer was formally appointed, the bankrupt muſt be conſidered as coming under that deſcription; and no perſon was in that ſituation, if he was not. Neither the preſident nor the ſtewards can be ſo conſidered. Certainly he was in the habit of giving a note for the money; and undoubtedly if theſe ſocieties lend their money upon ſecurity, they muſt ſtand in the ſame ſituation as the other creditors. But the bankrupt in all other reſpects, except giving the note, acted as treaſurer; and was conſidered as ſuch by the ſociety: the money being from time to time paid to him, and to him only. This caſe is therefore within the ſpirit and meaning of the Act.

Mr. Heald for the aſſignees contended, that the bankrupt never received this money by virtue of any office; but merely as a banker, or a perſon, to whom it was paid under a reſolution of the ſociety upon a ſecurity, bearing intereſt; and therefore not within the Act.

Lord CHANCELLOR—In one caſe (*a*) Lord *Roſslyn* held, that any man, who got the money of the ſociety into his hands, was within the Act. Upon a ſubſequent petition (*b*) I could not agree to that. I had a moſt clear opinion, that it was impoſſible to maintain

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(*a*) *Ex parte Aſhley, ante*, 441.

(*b*) *Ex parte Corſer, ante*, 441. *Ex parte The Amicable Society of Lancaſter, ante*, 98.

maintain the propoſition, that a man, who by conſent of the ſociety receives a ſum of money, giving a promiſory note for it as a debtor, is within the Act of Parliament an officer receiving it by virtue of his office. The caſe of another perſon receiving their money is the ſubject of another clauſe (*a*). If the bankrupt received as ſteward, preſident, as any officer of the ſociety, for what he received by virtue of his office you may make him accountable. But if the preſident received 300*l.*, and the ſociety afterwards authoriſed him to lend that out to a bank, in which he was a partner, they would not have it by virtue of his office. I have no conception upon the meaning of this Act of Parliament, that if they authoriſe him to lend it out upon ſecurity, the perſons, to whom it is lent, can be ſaid to have it by virtue of his office. By the conſent of the ſociety it is taken out of that poſſeſſion by virtue of his office.

I muſt obſerve, that, if theſe friendly ſocieties expect the benefit of that very liberal, and perhaps more liberal than juſt, proviſion of the Legiſlature in their favour, that all creditors, however meritorious, ſhall be ſacrificed to their demand, it is their buſineſs to take the protection given them in the mode, in which it is directed, by appointing a treaſurer and making him give ſecurity according to the Act.

The affidavits being contradictory, I will order the Commiſſioners to inquire, whether any and what ſums of money were in his hands at the date of the Commiſſion by virtue of his office belonging to the ſociety. But let it be underſtood, my decided opinion is, that if the money was lent by the conſent of the ſociety upon a promiſory note, carrying intereſt, it is not money in his hands by virtue of his office.

You may bring an action, if you pleaſe, under this Act.

(*a*) Sect. 6.

1802.

April 27.

Ex parte GIFFORD.

The diſcharge of a ſurety by the creditor has not the effect of a diſcharge of the principal without reſerve; and therefore a co-ſurety is not diſcharged. When it is aſcertained, what each of the co-ſureties has paid beyond his proportion, the Equity as between them is arranged upon the principle of contribution for the exceſs.

MARSHALL and *Haigh*, creditors of *Bedford* upon a promiſory note, requiring farther ſecurity, *Bedford*, *Niblock* and *Burgeſs*, and *Baylis*, joined in a promiſory note, as a collateral ſecurity. *Niblock* and *Burgeſs* and *Bedford* became bankrupts. *Marſhall* and *Haigh* proved the whole debt under each Commiſſion; and afterwards brought an action againſt *Baylis*; who entered into a compoſition with his creditors; under which *Marſhall* and *Haigh* received a dividend of 4*s.* in the pound; the receipt for which was expreſſed to be for 191 *l.* and two notes, which, when duly paid, will be in full of the ſaid debt and all other demands from him. The dividend paid by the eſtate of *Bedford* was 4*s.* in the pound; and that by the eſtate of *Niblock* and *Burgeſs* 5*s.*

The prayer of this petition was, that the proof againſt the eſtate of *Niblock* and *Burgeſs* may be expunged.

Mr. Romilly and Mr. Whiſhaw in ſupport of the petition—There is no doubt upon the caſes of *Rees* v. *Berrington* (*a*), *Niſbet* v. *Smith* (*b*), *Ex parte Smith* (*c*), *Engliſh* v. *Darley* (*d*), and *Law* v. *The Eaſt India Company* (*e*), that the creditor diſcharging the principal debtor diſcharges the ſurety. The queſtion is, whether any difference ariſes from the circumſtance, that this is the diſcharge of a co-ſurety. By ſettling in this manner with the co-ſurety *Niblock* and *Burgeſs* have every equity they could have had againſt him. They have put themſelves in the ſituation of *Baylis*. The remedy then is, if it does not go to the extent of the prayer of the petition, to expunge the whole debt, that at leaſt the eſtate of *Niblock* and *Burgeſs* is to be anſwerable only for ſo much as they are bound to pay, this tranſaction having taken place, and to ſtand in their place for a moiety of the dividends they may receive.

Mr. Richards, Mr. Alexander, and Mr. Cooke contrà—This is not to be compared to the caſe of principal and ſurety. *Bedford* was

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(*a*) *Ante*, vol. 2. 540.

(*b*) 2 *Bro. C. C.* 579.

(*c*) 3 *Bro. C. C.* 1. 1 *Cooke's* Bank. Law, 168. 170. ed. 4.

(*d*) 2 *Boſ. & Pul.* 61.

(*e*) *Ante*, vol. 4. 824.

the original debtor. Other perſons afterwards joined him in giving a ſecurity for the debt. The creditor may proceed againſt either. The only relief could have been a contribution among the ſureties. If a ſurety offers to pay part of the debt, the creditor by receiving it does not affect his ſecurity: nor is the perſon diſcharged. No injury is done to any one. On the contrary the other perſons liable are eaſed to the extent of the payment. It cannot affect the right to call upon the other debtors for the reſidue. So, if the creditor brings an action, and in the courſe of that action one of the ſureties pays part of the debt, that can make no difference. That is no injury, but an eaſe, to the others. As to the form of the receipt, it is merely a diſcharge of that ſurety. There is no objection in the creditor ſaying, he will not call on that perſon for any more. No injury is done to any one by undertaking not to ſue him. The creditor cannot be compelled to ſue any one; but may ſelect any one. *Baylis* could not reſiſt a bill for a contribution on the ground, that the creditor undertook to demand no more from him. The contribution muſt depend upon what they actually pay; when that ſhall be aſcertained. The ground of the caſes cited is, that no ſtep ſhould be taken, which would have the immediate effect of throwing upon the party diſcharged any part of that, from which the tranſaction was to diſcharge him. Conſider the inconvenience of ſuch a rule: any compromiſe, however advantageous, upon a bill of exchange would be impracticable. In this inſtance there is an affidavit, eſtabliſhing the prudence of this compoſition, that, if *Baylis* had been preſſed to the utmoſt extent, he would have become inſolvent. At all events no claim can ariſe, till theſe parties have paid more than their proportion.

The diſcharge of a ſurety by the creditor has not the effect of a diſcharge of the principal without reſerve; and therefore a co-ſurety is not diſcharged. When it is aſcertained, what each of the co-ſureties has paid beyond his proportion, the Equity as between them is arranged upon the principle of contribution for the exceſs.

Mr. Romilly in reply—It is admitted, that they meant to do what was beſt for the benefit of all parties: but that is immaterial: the authorities requiring, that they ſhould have conſulted thoſe, for whoſe benefit they profeſſed to act. All the caſes have gone upon that ground; that thoſe perſons ought to be conſulted, by the creditor, taking upon him to act as truſtee, before the compromiſe was entered into; not upon the ground, that he did not act *bonâ fide*. The conſideration was, that they ſhould completely diſcharge *Baylis*; and then it is clearly within the principle of thoſe caſes. It is ſaid, this would not affect our demand for a contribution. Is that according to the good faith of the tranſaction with *Baylis*? Did he underſtand that to be the conſequence: diſcharging him themſelves; but raiſing a demand againſt him by another perſon for 6*s.* in the pound? The diſtinction of this caſe is not in principle, but only in form; that the remedy would have been, not upon the inſtrument, but either by an action for money laid out to their uſe, or a bill for contribution.

Lord CHANCELLOR—Clearly it is impoſſible upon any principle, regulating caſes of this nature, that relief can be given to the extent prayed by this petition; and it alſo ſtrikes me, that the deciſion of any queſtion, that may ariſe in theſe bankruptcies, is ſomewhat premature: the queſtion depending upon the quantum of dividend, that the reſpective eſtates will pay. Theſe parties as between them reſpectively and *Bedford* are to be conſidered in the ſituation of principal and ſurety; and, as between themſelves, upon the principle of co-ſureties. As to *Bedford*, he is to pay the debt in equitable conſideration in relief of both; and proof being made againſt his eſtate, if the holder thought proper to receive a ſum of money in diſcharge of his eſtate, the caſe *Ex parte Smith*, and many others, would have entitled the ſurety to ſay, that if his eſtate was diſcharged, without any reſerve of the remedy againſt the ſureties, they would be diſcharged; firſt, upon this principle unqueſtionably; that the ſureties, if they paid the debt, would have been entitled to ſtand in the place of the creditor in reſpect of the proof againſt the eſtate of the principal; and therefore, when it is ſtated in ſome caſes, that it is for the intereſt of the ſurety, that the compromiſe ſhall be made, the anſwer is, thoſe, for whoſe benefit it is alleged to be made, are the proper judges, whether it is for their benefit; and it is not to be forced upon them: they having a clear equitable remedy to ſtand in the place of the creditor proving.

Grounds of the deciſion, that a diſcharge of the principal debtor, without a reſerve of the remedy againſt the ſurety, diſcharges the ſurety.

Another ground, upon which it has been reaſoned in ſome caſes, is, that upon the faith of ſuch a tranſaction with the principal, if there was no reſerve of the remedy againſt other perſons liable, in order to ſecure the intended effect of ſuch a contract to diſcharge him upon ſuch a payment, you muſt almoſt of neceſſity infer, that the party is not to take a remedy over againſt others, which would forthwith bring upon the party diſcharged all the evil, from which the prior moment the other had agreed to diſcharge him. Suppoſe 4*s.* in the pound paid by the principal, nothing being ſaid about remainder of the debt: it would be a very bad bargain, if the creditor could ſend another perſon, either upon the ſame inſtrument or a contract implied by the law, to take the debtor in execution for the remainder of the debt, for which that compoſition was made. The Court would therefore be inclined to infer, that it was not intended, that the perſon diſcharged ſhould ſtill remain liable. But certainly he might ſo frame his contract; and there are many caſes, in which it is not imprudent for the debtor to make the compoſition with a reſerve of the remedies, either underſtood, or an expreſs declaration to that effect. There would be nothing imprudent in the debtor ſo doing in this very caſe; unleſs it turns out, that the ſurety ſhall pay to an extent, in which he would be prejudiced, if barred of the remedy againſt the co-ſureties.

With reſpect to co-ſureties the caſe is different, but governed by principles in ſome degree the ſame. The principal is to diſcharge all the obligations of all the ſureties; but they ſtand with regard to each other in a relation, which gives riſe to this right among others; that, if one pays more than his proportion, there ſhall be a contribution for a proportion of the exceſs beyond the proportion, which in all events he is to pay. The party has a right to ſay for himſelf, he will not conſider the relation; but will take 6*s.*; though the ſurety is liable to pay 10*s.* He may ſay, he will be paſſive as to the other 4*s.*; or he will diſcharge the whole debt, and at his own riſk as to the remedy againſt the other ſurety: or he may reſerve the remedy againſt the co-ſurety expreſsly. It depends upon the effect and terms of the bargain actually entered into. It might be prudent in this very caſe for *Baylis*, *Bedford*'s ſon-in-law, to ſay, he would pay 4*s.* in the pound; recollecting, that *Niblock* and *Burgeſs* muſt pay more than 10*s.* in the pound, before any demand could be made by them againſt *Baylis*; and recollecting the remedies againſt *Bedford*. The queſtion therefore is, under the circumſtances what did they mean? As to the receipt the creditor contends, there is no difference, whether there is an expreſs reſervation of the remedies againſt the co-ſureties. But that diſtinction has been taken. At the time of Mr. *Richard Burke*'s caſe (*a*) Lord *Thurlow* admitted, that, if there is a reſerve of the remedies againſt the others, there is conſent of the party, with whom the compoſition is made; and if out of that a demand ariſes againſt him, it is a demand, which began to exiſt with his conſent expreſſed in the terms of the contract, and under ſome circumſtances wiſely and prudently given; for the party would not have entered into the contract, unleſs he was allowed to contract for that remedy over againſt the co-ſureties. If *Niblock* and *Burgeſs* ſhould not pay more than their moiety, the contract would be a beneficial contract for *Baylis*; for though paying more than *Baylis* they would not pay enough to bring an aſſumpſit againſt him. That would not therefore be an imprudent bargain for *Baylis* to make. It may however never be neceſſary to decide this; as it depends upon what dividends the eſtates of *Bedford* and of *Niblock* and *Burgeſs* pay. But I have a ſtrong opinion, that under the circumſtances the other perſons liable upon this note are not diſcharged, becauſe *Baylis* was contented to make a bargain, the effect of which leaves him to his chance as to his ultimate liability between him and his co-ſurety; and therefore that relief cannot be given even to the extent, to which it is now modified.

The order was, that under the preſent circumſtances the petition ſhould be diſmiſſed without coſts, and without prejudice to preſenting any other petition.

Ex parte WEBSTER.

March 26.

The MASTER OF THE ROLLS for the LORD CHANCELLOR.

Order upon petition for leave to traverſe an inquiſition upon a Commiſſion of eſcheat, found in favour of the Crown.

THIS petition prayed leave to traverſe the inquiſitions upon two Commiſſions of eſcheat, found in favour of the Crown. The Commiſſions iſſued in 1798. The petitioner claimed as heir at

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(*a*) Mr. *R. Burke* was a co-ſurety for an annuity; and it was held, that the grantee having given time to the principal could make no demand againſt the ſurety.

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law of *Mary Gardiner*; ſtating, that ſhe died ſeiſed in fee of the eſtates in queſtion, in the counties of *Northampton* and *Kent*; and that her will was not executed according to the Statute of Frauds (*a*). In 1801 an ejectment was brought by the father and mother of the petitioner againſt the grantees of the Crown; in which the plaintiffs were nonſuited, upon the return to the Commiſſion.

Mr. Romilly and Mr. Lewis in ſupport of the petition—Of courſe the party is entitled to traverſe the inquiſition; if the Court is ſatisfied, there is reaſon to believe he is heir at law. It has been determined, that the Statute extended to Commiſſions of eſcheat as well as inquiſitions by virtue of office. That is laid down in *Stamford upon the prerogative*; where a great deal is ſtated upon this. There is in this inſtance an affidavit of the pedigree; ſtating, that it was proved upon the trial of the ejectment: but it is not clear, that it is neceſſary, he ſhould go into evidence of his pedigree, as upon an ejectment, or as he muſt upon traverſing the inquiſition; for this is a proceeding *ex parte*; and the Jury muſt find, if there is no evidence to the contrary that the party died without heirs. But though it is only neceſſary for the petitioner to ſtate his belief of his being heir, he has gone into evidence of the pedigree.

Mr. Richards and Mr. Cooke contra—It is certainly neceſſary, that the perſon applying ſhould make out a title, as much as upon an ejectment: *Vaughan* 64: that is; he muſt ſhew evidence, that would ſatisfy a Jury. Probable evidence, ſuch as would be received in a Court of Law ought to be produced. The words of the Statute are "traverſe that office or otherwiſe to ſhew his "right." Though the nonſuit in the ejectment was upon the production of the return to the Commiſſion, the affidavits againſt the Commiſſion ſtate, that the Judge obſerved, the evidence was very looſe. Upon ſuch an application this Court will take care, that parties are not haraſſed, and put to an unneceſſary expence. Therefore in lunacy a ſtrong ground is always required upon the ſanity and alſo upon the intereſt of the party applying (*b*). None of theſe affidavits ſhew, that the regiſters have been ſearched as to marriage and births, ſo as to produce evidence fit to be re-

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(*a*) Stat. 29 *Ch.* 2. *c.* 3.

(*b*) See *Ex parte Ward*, *ante*, 579.

ceived in a Court of Law. At leaſt ſecurity ought to be given for the coſts; as has been done in lunacy.

Mr. Romilly in reply—The party is entitled to traverſe. The meaning of the words in the ſtatute referred to is, that it ſhall not prevent a petition of right; not to veſt a diſcretion in the Court. The petitioner lays a *primâ facie* title; and it is not neceſſary here, upon an application *ex parte* in its nature, to give all the evidence. Uncontradicted it is ſufficient; and the Jury muſt find upon it. As to the coſts there can be none. The King neither pays, nor receives, coſts. The Court is not at liberty to impoſe terms upon the party.

The Maſter of the Rolls took time to conſider; and afterwards made the order.

The traverſe was found in favour of the Crown.

It was agreed at the bar, that the application to the Court was proper: as in lunacy; though the words of that ſtatute (*a*) are full as ſtrong; and the late caſes *Ex parte Wragg*, *Ex parte Ferne* (*b*), were referred to.

Ex parte EXLEIGH.

April 28.

Proof under a Commiſſion of bankruptcy againſt an overſeer of the Poor in reſpect of money in his hands at the time of his bankruptcy before the period of accounting.

THE object of this petition was to prove under a Commiſſion of Bankruptcy againſt one of the overſeers of the poor in reſpect of money in his hands at the time of his bankruptcy.

Mr. *Cooke* mentioned the caſe of *The King* v. *Egginton* (*c*), as unſatisfactory; obſerving upon the reaſon aſſigned by Mr. Juſtice *Buller*, that there could be no action, that ſtill there might be a good equitable debt; which might be proved.

(*a*) Stat. 2 *Ed.* 6. *c.* 8.

(*b*) *Ante*, vol. 5. 450. 832.

(*c*) 1 *Term Rep. B. R.* 369.

The Lord CHANCELLOR diſapproved that caſe; obſerving, it was very dangerous to hold, that, becauſe the time of accounting had not arrived, in caſe of the bankruptcy of the truſtee there was not ſuch an aſſumpſit as could enable them to prove. His Lordſhip ſaid, that if there was no oppoſition, the order ſhould be made.

April 28.

Ex parte GREENWAY.

Proof allowed under a Commiſſion of Bankruptcy in reſpect of a bill alleged to be loſt: but the moſt extenſive indemnity to be given; and to be ſettled by the Commiſſioners.

THE object of this petition was to be admitted to prove under a Commiſſion of Bankruptcy in reſpect of a bill of exchange, alleged to be loſt after indorſement. The affidavits ſtated, that bill was returned from *America* proteſted; and the ſhip was captured in her return; and carried into the Iſle of *Rhe* in *Britany*.

Lord CHANCELLOR—To enable you to prove in reſpect of this bill, there muſt be a moſt extenſive indemnity, even for the ſake of the bankrupt, who is intereſted in this; a complete indemnity, going to all the conſequences, againſt the holder, if the bill has not been paid, and againſt any demand, that may be made by future poſſible holders, if it ſhould have been paid. When I was Chief Juſtice, I tried an action in the Common Pleas upon a bill, alleged to be loſt; which had been previouſly indorſed by the payee. An indemnity was offered by bond: but I nonſuited the plaintiff. The counſel objected ſtrongly upon the offer of indemnity; and it came before the Court upon a motion for a new trial; and there was a long diſcuſſion upon the nature of theſe indemnities in a Court of Law. The Court had not come to a deciſion upon it, when I left them; and I do not know the reſult. But I never could underſtand, by what authority Courts of Law compelled parties to take the indemnity.

Upon the new doctrine of diſpenſation with the *profert* of a bond that difficulty does not ariſe; for there is the finding of the Jury upon the evidence, that the inſtrument is loſt; which is concluſive between thoſe parties. That has been ſettled at law, certainly in oppoſition to the opinions of ſome of the greateſt lawyers,

lawyers. Since I have ſat here, I have found in Lord *Hardwicke*'s own hand (and he was one of the greateſt lawyers, who ever ſat in *Weſtminſter Hall*) his moſt poſitive declarations, that upon ſuch an inſtrument it is impoſſible to maintain an action without *profert* (*a*). The law is however now ſettled otherwiſe (*b*). I do not preſume to diſpute it; for it may be ſettled upon grounds of pleading: it may proceed upon a ſuppoſed analogy to the proceedings in Courts of Equity; and it may proceed upon both. With regard to the ſuppoſed analogy to proceedings in equity, it is queſtionable, whether ſufficient attention was paid to the conſideration, that in equity the conſcience is ranſacked; and the party alleging, that the inſtrument is loſt, muſt make an affidavit, that it is not in his poſſeſſion or power (*c*). The conſequence is, that if a man having an annuity deed differing from the memorial is diſhoneſt enough to put it in the fire, and then to ſay, it is loſt, he is to prove the contents. The beſt mode of doing that ſeems to be by producing the memorial; and yet that memorial, if the deed was produced, would have deſtroyed the deed.

Profert now diſpenſed with at law. The reaſon of that deciſion queſtionable.

The order was, that the petitioner ſhould be admitted to prove upon giving an indemnity: the Commiſſioners to ſettle a proper indemnity (*d*).

(*a*) 1 *Veſ.* 345. 393. (*b*) *Read* v. *Brookman*, 3 *Term Rep. B. R.* 151.

(*c*) See Mr. *Fonblanque*'s note, *Treat. Eq.* 16 *Ed.* 2.

(*d*) *Walmſley* v. *Child*, 1 *Veſ.* 341.

Ex parte CLAY.

April 28.

Joint creditors admitted to prove under a ſeparate Commiſſion for the purpoſe of keeping ſeparate accounts and aſſenting to or diſſenting from the certificate, but not to receive dividends with the ſeparate creditors.

THIS petition was preſented by joint creditors; praying, that they may be admitted to prove and receive dividends under a ſeparate Commiſſion.

Mr. *Johnſon* in ſupport of the petition.

Lord Chancellor—The rule, that prevailed in Lord *Hardwicke*'s time, and down to the time of Lord *Thurlow*, was, that joint creditors ſhould not be admitted to prove under a ſeparate Commiſſion for the purpoſe of receiving dividends with the ſeparate creditors. Lord *Thurlow* altered that upon much conſideration; thinking, the joint creditors ought to be admitted with the ſeparate creditors; and left it ſo, when he left this Court. Lord *Loughborough* thought, that was not right; and got back again, not quite to the old rule: but he ſettled it, that they ſhould prove only for the purpoſe of keeping ſeparate accounts, but not to receive a dividend. I do not preſume to ſay, which is the beſt rule; except, that the laſt is open to this difficulty; that the creditor is not a party to the proceedings under the Commiſſion. But I think it better to follow the rule, that I find eſtabliſhed than to let it be continually changing, ſo that no one can tell, how it is. Therefore unleſs ſome more prominent miſchief can be pointed out, take the order according to Lord *Loughborough*'s rule (*a*).

(*a*) *Ex parte Elton, ante*, vol. 3. 238. *Ex parte Abell, ante*, vol. 4. 837. See the caſes collected, 1 *Cooke*'s Bank. Law, 237. Ed. 4.

Ex parte Pinkerton, before Lord *Eldon*, 20th *April* 1801:

The prayer of the petition was to be at liberty to prove under a ſeparate Commiſſion the ſum of 223*l.* 18*s.* 6*d.* upon a bill of exchange, drawn by two perſons; one of whom was ſolvent, but abroad, and not likely to return; and the other was the bankrupt. They were connected only in this tranſaction. There was no joint property.

The Lord Chancellor ſaid, whatever he thought of a ſettled rule, he ſhould adhere to it, on account of the miſchief ariſing from ſhaking ſettled rules; but obſerved, that it ſeemed very ſingular, that the nature of the debt ſhould turn upon the fact, whether there is joint property, or not.

His Lordſhip made the order, that the petitioner ſhould be admitted to prove his debt; reciting, that it was admitted, there was no joint property.

In *Ex parte Nuttall*, 22d *June* 1801, the Lord Chancellor alſo followed the caſes before Lord *Loughborough*; obſerving, that he did ſo, that the rule ſhould not change with every new Judge, rather than from any other motive.

STREET *v.* RIGBY.

April 30.

To a bill for diſcovery and relief. Plea of an agreement to refer to arbitration overruled.

THE bill ſtated articles of agreement between the plaintiff and defendant, to become partners as attorneys and ſolicitors; by which articles it was declared, that the partnerſhip ſhould be bound by all uſual and cuſtomary conditions of partnerſhip concerns, as fully as though the uſual covenants, clauſes and proviſoes, were inſerted; and that either partner ſhould have power to diſſolve the partnerſhip on giving two months' notice previous to the 1ſt of *September* 1797, or any ſucceeding 1ſt of *September*: all diſputes to be referred to arbitration; and the arbitrators to have a power of diſſolving the partnerſhip, if they ſhall think proper. The partnerſhip was diſſolved by conſent upon the 1ſt of *September* 1799.

The bill then ſtated, that the plaintiff made out the accounts; that ſeveral meetings took place for the purpoſe of examining them; at one of which meetings all the errors were finally ſettled and corrected, as far as the plaintiff was then enabled to do ſo from the accounts rendered by the defendant, and except as to a ſum of 105 *l.*; which had been received by the defendant without the knowledge of the plaintiff: but the defendant, though requeſted, refuſed to ſettle or ſign any account. The plaintiff afterwards ſent the defendant a draft of an agreement for arranging the outſtanding debts: but no anſwer being returned, and the plaintiff having found, that the defendant had received 105 *l.*; which had never been brought to account, plaintiff claimed his ſhare of that ſum. On the 1ſt of *Novembes* 1800 accounts were mutually delivered; and there was only 4 *s.* difference; and the only ſum in diſpute was the ſaid ſum of 105 *l.*; to which the defendant claims to be entitled as ſeparate money; and the defendant admitting, that the 105 *l.* was the only queſtion in diſpute, that queſtion alone was ſubmitted to arbitration; but the arbitrator declining to proceed on the reference, the plaintiff ſent the defendant an account up to that time, and demanded payment.

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The bill farther ſtated, that without an account from the defendant of his ſubſequent receipts on account of the partnerſhip it will be impoſſible for any arbitrator to aſcertain, what are the matters in difference between the parties; and charging, that the accounts ſtated to the defendant were true, and that all the neceſſary vouchers were communicated to him; and that the defendant refuſed the account deſired by the plaintiff, prayed, that the defendant may account for all ſums received by him on the partnerſhip account, not credited in the account rendered by him; and that the plaintiff may be declared entitled to three-fourths of the 105 *l.*; an account of what is due to the plaintiff on the accounts delivered; with liberty to ſurcharge and falſify; and that the defendant may be decreed to pay the balance on the whole accounts aforeſaid, with intereſt.

The defendant pleaded in bar to the whole bill that the plaintiff and defendant by articles of partnerſhip, dated the 27th of *July* 1796, agreed to become partners from Chriſtmas laſt to the 1ſt of *September* next, and from the 1ſt of *September* for one year, and ſo from year to year, ſubject to the proviſion for diſſolution, &c.; and it was thereby agreed, that all diſputes relating to the ſaid partnerſhip, and the accounts, tranſactions and dealings of the ſaid parties in conſequence thereof ſhould be referred to arbitration.

The plea then referred to the articles; and averred, that all the diſcovery and relief ſought by the bill relate to the partnerſhip, and to the accounts, tranſactions and dealings, of the parties, in conſequence thereof only; and that the ſame have not, nor hath any part thereof, been referred to arbitration, except as to the ſum of 105 *l.*; which alone was referred to arbitration: but as to that the arbitrator has declined to proceed; and ſuch arbitration is determined without any award; and the plaintiff did not even propoſe a reference, or nominate an arbitrator of the ſaid matters and diſputes, except as to that ſum of 105 *l.*; in reſpect whereof the arbitration is determined, as aforeſaid; although the defendant offered and was always ready and hereby offers to refer the ſame to arbitration.

Mr. Piggott and Mr. Hall argued in ſupport of the plea; and cited the following caſes: *Wellington* v. *M'Intoſh* (*a*). *Halfhide* v. *Fenning* (*b*). *Kill* v. *Holliſter* (*c*). *Mitchell* v. *Harris* (*d*). *Taterſall* v. *Groote* (*e*). *Aſtley* v. *Weldon* (*f*).

Mr. Richards for the plaintiff was ſtopped by the Court.

Lord Chancellor—This bill is produced upon a notion, that the matter averred in the plea in ſome way ouſts the juriſdiction of this Court; I do not know, whether the argument ſuppoſes it deſtroyed, but by putting it, as it were, in abeyance and ſuſpenſion, till ſome proceeding is had before arbitrators. I give this defendant the benefit of the conſtruction put by him upon the articles; though it is fairly queſtionable, attending to the articles, whether the covenant extends to a ſettlement of all accounts poſterior to the diſſolution. I will for the preſent purpoſe take that to be the meaning of the covenant. It has occurred to me, that in almoſt every caſe of this ſort the parties have adopted a fancy, that they can make any thing in the contemplation of the Court fit to be conſidered matter of diſpute, upon which they think proper to diſpute. That is not ſo. It muſt be that, which a Court will ſay is fairly and reaſonably made matter of diſpute. Another circumſtance is, that the parties do not frequently appreciate the effect of ſuch a covenant. Firſt, at Law, in the caſe in the Court of Common Pleas the Judges *Heath* and *Rooke* ſeemed to think it futile, and tantamount to a covenant to forbear ſuit. I take notice of the circumſtance, as material with regard to *Halfhide* v. *Fenning*; for if the meaning of a covenant to refer is to forbear ſuit altogether, that covenant to refer, before you bring ſuit, and to ſuſpend it in the mean time, would ſtand upon principles *pro tempore*, that it would be very difficult to ſay do not apply to both thoſe covenants. Suppoſe an action brought. The queſtion would be, what the damages would have been, if the defendant had joined, and named an arbitrator, and evidence had been produced (and what that would be could by no means be correctly proved) and an award had been made, giving ſome ſuppoſed ſum, which no proof could aſcertain. The effect therefore of ſuch a

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(*a*) 2 *Atk.* 569. (*b*) 2 *Bro. C. C.* 336. (*c*) 1 *Wilſ.* 129.
(*d*) 4 *Bro. C. C.* 411. *Ante*, vol. 2. 129. (*e*) 2 *Boſ. & Pul.* 131.
(*f*) 2 *Boſ. & Pul.* 346.

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The bill farther ſtated, that without an account from the defendant of his ſubſequent receipts on account of the partnerſhip it will be impoſſible for any arbitrator to aſcertain, what are the matters in difference between the parties; and charging, that the accounts ſtated to the defendant were true, and that all the neceſſary vouchers were communicated to him; and that the defendant refuſed the account deſired by the plaintiff, prayed, that the defendant may account for all ſums received by him on the partnerſhip account, not credited in the account rendered by him; and that the plaintiff may be declared entitled to three-fourths of the 105 *l.*; an account of what is due to the plaintiff on the accounts delivered; with liberty to ſurcharge and falſify; and that the defendant may be decreed to pay the balance on the whole accounts aforeſaid, with intereſt.

The defendant pleaded in bar to the whole bill that the plaintiff and defendant by articles of partnerſhip, dated the 27th of *July* 1796, agreed to become partners from Chriſtmas laſt to the 1ſt of *September* next, and from the 1ſt of *September* for one year, and ſo from year to year, ſubject to the proviſion for diſſolution, *&c.*; and it was thereby agreed, that all diſputes relating to the ſaid partnerſhip, and the accounts, tranſactions and dealings of the ſaid parties in conſequence thereof ſhould be referred to arbitration.

The plea then referred to the articles; and averred, that all the diſcovery and relief ſought by the bill relate to the partnerſhip, and to the accounts, tranſactions and dealings, of the parties, in conſequence thereof only; and that the ſame have not, nor hath any part thereof, been referred to arbitration, except as to the ſum of 105 *l.*; which alone was referred to arbitration: but as to that the arbitrator has declined to proceed; and ſuch arbitration is determined without any award; and the plaintiff did not even propoſe a reference, or nominate an arbitrator of the ſaid matters and diſputes, except as to that ſum of 105 *l.*; in reſpect whereof the arbitration is determined, as aforeſaid; although the defendant offered and was always ready and hereby offers to refer the ſame to arbitration.

Mr. Piggott and Mr. Hall argued in ſupport of the plea; and cited the following caſes: *Wellington* v. *M'Intoſh* (*a*). *Halfſhide* v. *Fenning* (*b*). *Kill* v. *Holliſter* (*c*). *Mitchell* v. *Harris* (*d*). *Taterſall* v. *Groote* (*e*). *Aſtley* v. *Weldon* (*f*).

Mr. Richards for the plaintiff was ſtopped by the Court.

Lord Chancellor—This bill is produced upon a notion, that the matter averred in the plea in ſome way ouſts the juriſdiction of this Court; I do not know, whether the argument ſuppoſes it deſtroyed, but by putting it, as it were, in abeyance and ſuſpenſion, till ſome proceeding is had before arbitrators. I give this defendant the benefit of the conſtruction put by him upon the articles; though it is fairly queſtionable, attending to the articles, whether the covenant extends to a ſettlement of all accounts poſterior to the diſſolution. I will for the preſent purpoſe take that to be the meaning of the covenant. It has occurred to me, that in almoſt every caſe of this ſort the parties have adopted a fancy, that they can make any thing in the contemplation of the Court fit to be conſidered matter of diſpute, upon which they think proper to diſpute. That is not ſo. It muſt be that, which a Court will ſay is fairly and reaſonably made matter of diſpute. Another circumſtance is, that the parties do not frequently appreciate the effect of ſuch a covenant. Firſt, at Law, in the caſe in the Court of Common Pleas the Judges *Heath* and *Rooke* ſeemed to think it futile, and tantamount to a covenant to forbear ſuit. I take notice of the circumſtance, as material with regard to *Halfſhide* v. *Fenning;* for if the meaning of a covenant to refer is to forbear ſuit altogether, that covenant to refer, before you bring ſuit, and to ſuſpend it in the mean time, would ſtand upon principles *pro tempore*, that it would be very difficult to ſay do not apply to both thoſe covenants. Suppoſe an action brought. The queſtion would be, what the damages would have been, if the defendant had joined, and named an arbitrator, and evidence had been produced (and what that would be could by no means be correctly proved) and an award had been made, giving ſome ſuppoſed ſum, which no proof could aſcertain. The effect therefore of ſuch a

(*a*) 2 *Atk.* 569.
(*b*) 2 *Bro. C. C.* 336.
(*c*) 1 *Wilſ.* 129.
(*d*) 4 *Bro. C. C.* 411. *Ante*, vol. 2. 129.
(*e*) 2 *Boſ. & Pul.* 131.
(*f*) 2 *Boſ. & Pul.* 346.

covenant is, that as the damages are not to be aſcertained by evidence, nominal damages only can be got. Whoſe fault is it? There are prudential ways of drawing theſe articles. There might have been an agreement for liquidated damages, to enforce a ſpecific performance, if an action could not produce ſufficient damages, or Equity would not entertain a bill for a ſpecific performance. If they had enforced their legal remedy by ſuch a ſtipulated ſecurity, it would be very difficult to ſay, they would alſo have a remedy in Equity. In the caſe from *Aſtley*'s Theatre (*a*) there was no diſpute in the Court of Common Pleas, that the actreſs might have agreed upon a liquidated ſum to be forfeited for non-attendance, *&c.* The Court were of opinion very properly, that, where there was a ſtipulated ſum in the covenant, that was the ſtipulated damages; and the general ſum of 200*l.* for breach of any of the articles was a penalty: but it was not doubted, that ſum might have been made the liquidated damages, if they thought proper. The party muſt put himſelf in a ſituation to have ſubſtantial damages. In this caſe upon an action they could have only 1*s.*; for they could not aſcertain, what more they were to have.

Then what can they have in Equity? There is conſiderable weight, as evidence of what the Law is, in the circumſtance, that no inſtance is to be found of a decree for ſpecific performance of an agreement to name arbitrators; or that any diſcuſſion upon it has taken place in experience for the laſt twenty-five years. I was Counſel in *Price* v. *Williams*: a caſe, which juſtifies conſiderable doubts, whether the eulogia upon the domeſtic forum of arbitrators are well founded. That was a caſe before Lord *Thurlow* upon a bill for ſpecific performance of ſuch an agreement, ſending parties to arbitrators, who might or might not be able to come to a deciſion; and Lord *Thurlow* was of opinion, that the Court would not perform ſuch an agreement. The Court, if it is not part of the agreement, cannot give them authority to examine upon oath; and the agreement itſelf cannot authoriſe any perſon to adminiſter on oath. A difficulty ariſes from the want of the conſcience of the party. This Court has given credit to itſelf, notwithſtanding what has paſſed in the Court of *King's*

Bill for ſpecific performance of an agreement to refer to arbitration does not lie.

(*a*) *Aſtley* v. *Weldon*, 2 *Boſ.* & *Pul.* 346.

Bench in their rules upon Attachments, as likely to decide as well as arbitrators; and it requires a ſtrong caſe to deprive a perſon of the right to a deciſion here. In *Price* v. *Williams* the account came back very favourable to my client: the reſult being, that a very ſmall ſum was due from him. A vaſt number of exceptions were taken; and the Court felt that ſort of difficulty of dealing with the exceptions, that led to an arbitration; though at firſt the Court would not hear of it; and the party, who had not been able to eſtabliſh any thing before the Maſter, in that mode gained ſeveral thouſand pounds. Then the difficulty occurred about the power of this Court to review the deciſion of arbitrators; and in the end my client fared much worſe than he would have done before the Maſter. That caſe and others led me to adopt a rule never to adviſe an arbitration afterwards.

If ſuch a bill never has been uſually filed in this Court, and if in that inſtance Lord *Thurlow* was of opinion it could not be maintained, the juriſdiction would ſtand upon principles not very intelligible, if a party, who by the imbecility belonging to the covenant could recover only 1*s.* damages in an action, coming to this Court for ſubſtantial juſtice, to have an account taken, that perſon, who could not file a bill for a ſpecific execution of the agreement to refer, can ſay, that, though he admits, neither of them could recover more than 1*s.* at Law, and he cannot demand the relief by way of a ſpecific performance, he can have it by pleading the covenant, if he is brought in the character of a defendant; and can compel the other to go to that tribunal, to which the defendant coming in the character of plaintiff could not oblige him to reſort. It is very difficult to ſay, that ſhould be the law of the Court. Then, is it ſo? I look upon the caſe of *Wellington* v. *M'Intoſh* as an authority, that at that time it was not the law of the Court. At that period the diſtinction, taken in later caſes (*a*), had not obtained; that the plea, though it might have been good as to the relief, is bad, if bad as to the diſcovery. As to that the courſe of the later authorities ſeems to have altered the law of pleading. But *quoad* ſuch a point as this the plea, if good to the relief, muſt be good to the diſcovery; for this plea means this, if any thing; that the parties will not haraſs them-

Plea good to the relief, is bad, if bad as to the diſcovery; though formerly otherwiſe.

(*a*) See *Anth* v. *Sambourne*, 4 *Bro. C. C.* 498.

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ſelves by going to Courts of Juſtice; but will ſtate to each other what is in diſpute, and refer that to arbitrators; and entering into ſuch a covenant they muſt be taken to mean, that they will be content with a deciſion upon ſuch diſcovery as arbitrators can compel, without ſubjecting each other to the neceſſity for either to be examined upon oath, before arbitrators, who cannot examine them upon oath. They chooſe therefore that forum excluſive of the juriſdiction of the country to all intents and purpoſes; meaning, that arbitrators ſhall from beginning to end do that, which they are enabled to do, *viz.* to decide between them as well as they can. It would be a breach of covenant, that would entitle them to nominal damages, to file a bill for diſcovery, as much as a bill for diſcovery and relief.

In *Halfhide* v. *Fenning* the whole of my argument according to the Report amounts to taking the diſtinction between diſcovery and relief, and putting the caſe upon that diſtinction; and if it was ſo argued, I am not ſurpriſed, that Lord *Kenyon* ſhould take it, that the Counſel thought, if not put upon that, it could not be ſupported. But it is not to be put upon that diſtinction, but upon the ground I have ſtated. It is ſaid, Courts of Law think theſe agreements very wiſe. *Kill* v. *Holliſter* however ſhews, that Courts of Law are ready enough to ſay, the agreement of the parties ſhall not ouſt their juriſdiction; though they permit it to ouſt the juriſdiction of Courts of Equity. But they enforce the agreement, not as agreement, but by granting an attachment for breach of the rule. It is dealing a little imperiouſly to ſay, that an agreement, which, made out of Court, would not bar an action, if made in Court, ſhall bar a bill. It was juſtly obſerved upon the paſſage in *Atkyns* (*a*), that arbitrators cannot adminiſter an oath; and the agreement will not enable them. We ſee in daily practice at Law, the Court adminiſters the oath; and under that the parties go before the arbitrators. It is ſaid, the party muſt have diſcovery ſome way. But if the diſtinction cannot be maintained between a bill for diſcovery only and for both diſcovery and relief, it muſt be ſaid, they are bound to go firſt before the arbitrators; and the party muſt be brought there; and muſt refer: the parties to be examined upon honour; for they cannot upon oath; and then it

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(*a*) In *Wellington* v. *M'Intoſh*, 2 *Atk.* 569.

is ſaid, as in the argument of theſe caſes, if it ſo turns out, then they are to come to this Court; ſaying, there is then a failure of the juſtice, for which they covenanted; and therefore there is a juriſdiction in this Court. Till *Halſhide* v. *Fenning* no ſuch decree was ever heard of. Next, expreſſing it in terms of the higheſt reſpect and veneration for that noble and learned perſon, now no more, I doubt, whether it is a very wiſe exerciſe of the juriſdiction of this Court, recollecting, that it is to give a relief beyond the Law, not to order the parties to go to Law to take the effect of the ſtipulated remedy, but under a poſitive covenant, not a negative covenant, that they will not ſue, (upon which there would be conſiderable difficulty) to ſend them by way of experiment to that juriſdiction, ſo likely to miſcarry, under the circumſtance, that it has not, unleſs received under the authority of the Court, a power to adminiſter an oath, where the juſtice that tribunal can render is ſo inſufficient, though they have not expreſsly bound themſelves by covenant; and, whether the Court would not act more diſcreetly by ſaying, they are in a Court, where juſtice can certainly be done; and as they have not ſtipulated to the contrary, their fate ſhall be decided here, inſtead of ſending them to ſo improvident a tribunal. I recollect paſſages, in which Courts of Juſtice, however full of eulogia upon theſe domeſtic forums, have recollected their own dignity ſufficiently to ſay, they would not be ancillary to thoſe forums; that the parties ſhould not be permitted to take their relief from them, coming here for diſcovery. It is enough for me to ſay, it is not a neceſſary conſequence of a covenant to refer, that the party thereby agreed to forbear to ſue. I do not enter into the queſtion of the effect at Law of a covenant to forbear to ſue. But, ſuppoſing it good, in ſtrict law it cannot be maintained, that having covenanted to refer the party has covenanted to forbear to ſue; and if not, he has only left himſelf open to an action for damages, if he does not refer; which the ſuit does not prevent, if thought adviſeable. It would be very ſtrong to ſay, that, where the legal remedy they have provided for themſelves is utterly incompetent to juſtice, this Court is precluded from granting its ordinary remedy, by a covenant, which does not in terms expreſs an undertaking not to reſort to this Court; and muſt hold that doctrine upon a plea; in that ſhape permitting the defendant to have in ſubſtance a ſpecific performance, which would have been refuſed to him as a plaintiff; at the hazard of

Courts of Equity will not be ancillary to arbitrators, by permitting the party to take relief from them, coming to the Court for diſcovery.

As to the effect of a covenant to forbear ſuit, *Quære.*

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doing ſubſtantial injuſtice, of a delay of juſtice almoſt of neceſſity, and, where the examination cannot be addreſſed to the conſcience of either the parties or the witneſſes; from which the ſubject cannot be debarred unleſs by expreſs terms, or neceſſary implication. That this has not the effect of barring the legal remedy is clear from the caſes at Law; which agree, that it is ſtill competent to him to take the legal remedy (*a*). Then why not the equitable? The competency to take both ſtands upon the ſame principle.

But farther, thoſe grounds are not neceſſary to the deciſion of this cauſe. It is ſaid to be natural and moral juſtice to give them this benefit upon the plea. But what right has the defendant to ſay that upon this record; which upon this argument muſt be taken to be true? Then what right has he upon any principle of natural and moral juſtice to call upon this Court to name arbitrators? Before that he is bound to make a full and free diſcloſure as to what are the matters in diſpute. The bill ſtates, that the plaintiff has diſcovered, that the defendant received a ſum of 105*l.* for a bill of coſts, not brought into the account. That was not a proper ſubject of diſpute before the arbitrator. When the defendant has ſtated, whether he has received that ſum, in what manner, and under what circumſtances, it may be proper matter of diſpute, whether the plaintiff is entitled to any, and what part of it. But the fact, that this ſum of money is in theſe circumſtances, leads to the allegation, that other ſums may have been received; and the plaintiff may aſk that queſtion. He alleges, that the defendant refuſed to anſwer that; and that no juſtice can be done, till it is anſwered. If there is nothing to diſpute about, plain dealing requires, they ſhould not be driven to go before arbitrators; and that there ſhould previouſly be a full diſcovery; and if theſe allegations are true, there is concealment, which muſt diſable the party from ſaying, he has a right under ſuch circumſtances to go to arbitration under this covenant; and I have conſiderable doubt, to ſay no more of it, whether if they were before a Jury, and the party had refuſed to diſcover, it would not be very difficult to maintain an action; for he would not appear as having a right to an arbitration.

(*a*) *Thompſon* v. *Charnock*, 8 *Term Rep. B. R.* 139.

Upon the ſpecial circumſtances therefore this plea cannot be maintained; and it is not neceſſary to decide upon the general ground: but upon the point, whether that covenant, that would not prevent an action at law, would prevent a bill in equity upon ſuch implication, no ſuch thing being expreſſed in terms, I have an opinion; as to which I will not ſay more than that I do not think at preſent, this Court has upon ſuch a covenant any right to ſay, the party has bound himſelf by any agreement not to reſort to the equitable juriſdiction of the country.

The parties afterwards, when the cauſe came on to be heard, agreed to go to a general account.

THOMAS *v.* LLEWELLYN.

May 1.

The time allowed for filing exceptions *nunc pro tunc* is two terms and the following vacation.

MR. *Holliſt for the plaintiff* moved to file exceptions *nunc pro tunc*; the anſwer having been filed in the vacation after laſt *Trinity* Term.

Mr. *Holliſt* ſaid, ſome doubt had been entertained as to the time: but the practice was ſettled in the time of Lord *Camden*, that the party has two terms, and the vacation before the third (a).

The order was made accordingly.

(a) The firſt day of *Eaſter* Term was the 5th of *May*.

HUTCHEON *v.* MANNINGTON.

May 14.

A Notary Public has credit every where; but the certificate of a Magiſtrate of a colony abroad requires evidence to his character.

MR. *Leach* moved, that a ſum of 678*l.* 8*s.* 6*d.* Bank 3 *per cent.* Annuities, and 10*l.* 3*s.* 6*d.* caſh, in the name of the Accountant General in truſt in the cauſe, to the

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account of *Richard Mannington*, may be transferred and paid under a power of attorney, executed in the *Prince of Wales's Iſland* in the *Eaſt Indies*, and atteſted by two witneſſes.

The motion was made upon a certificate, ſigned and ſealed by *George Counter*, Magiſtrate, and *William Scott*, Notary Public, in that Iſland; that the two ſubſcribing witneſſes to the Power of Attorney ſwore the affidavit produced; that they were perſons of credit; and *Scott* was a Notary Public.

The affidavit was to the identity of *Richard Mannington*; and ſtated, that the deponents witneſſed the execution of the annexed Power of Attorney.

William Scott certified as Notary Public, that the annexed writings were true copies. *Counter*, it was ſuggeſted, was Governor of the Iſland.

The Lord CHANCELLOR thought the evidence not ſufficient; obſerving, that a Notary Public by the Law of Nations has credit every where: the Court therefore will give credit to him; but that it was neceſſary to prove, that the other perſon was a Magiſtrate.

Upon inquiry at the *India Houſe* it appeared from the proceedings of the Governor-General of *Bengal*, that *George Counter* was a Magiſtrate.

The order was made.

END OF THE SITTINGS BEFORE EASTER TERM.

On the death of Lord *Kenyon* in the vacation Sir *Edward Law*, His Majeſty's Attorney-General, was called to the degree of Serjeant at Law; and appointed Lord Chief Juſtice of the Court of *King's Bench*; and was created a Peer of the United Kingdom by the Title of Baron of *Ellenborough* in the county of *Cumberland*. His Lordſhip was ſworn a Member of His Majeſty's Moſt Honourable Privy Council.

The Honourable *Spencer Perceval*, His Majeſty's Solicitor-General, was appointed Attorney-General to His Majeſty.

Thomas Manners Sutton Eſq. Chief Juſtice of the *North Wales* Circuit, and Solicitor-General to His Royal Highneſs the Prince of *Wales*, was appointed Solicitor-General to His Majeſty.

The Honourable *Thomas Erſkine* was appointed Chancellor to His Royal Highneſs the Prince of *Wales*.

William Adam Eſq., one of His Majeſty's Counſel, was appointed Solicitor-General to His Royal Highneſs.

of Attorney swore the affidavit produced [illegible] to examine and *Scott* was a Notary Public.

[illegible] and stated, that the deponent [illegible] of Power of Attorney.

The LORD CHANCELLOR thought the [illegible] that a Notary Public by the Law of Nations has credit [illegible] that it was necessary to prove [illegible]

Upon inquiry at the *India House* it appeared from the proceedings of the Governor-General of *Bengal*, that *George Coates* was a Magistrate.

The order was made.

END OF THE SITTINGS BEFORE EASTER TERM.

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Agreement.

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11. Whether the anſwer admitting poſſeſſion taken under the agreement, takes the caſe out of the ſtatute of frauds, where it is not clear, what the agreement was, *Quære.* The Court endeavours to collect, what are the terms. 470

12. A legatee having taken a mortgage in part payment, ſubject to an agreement for payment out of the other aſſets and a reſumption of the mortgage, was held entitled to the benefit of that agreement; accounting for the difference of intereſt. *Sitwell* v. *Bernard.* 520

13. A bill alleging a written agreement may be ſuſtained by evidence of a parol agreement, *Spurrier* v. *Fitzgerald.* 548

14. After anſwer admitting an agreement, and ſubmitting to perform it, the bill being amended as to other circumſtances, the defendant was not permitted to take advantage of the ſtatute of frauds by the anſwer to the amended bill; and a ſpecific performance was decreed. *Spurrier* v. *Fitzgerald.* 548

15. In enforcing contracts upon the principle of compenſation for a variance from the deſcription the Court has gone ſo far, to the extent even of wholly defeating the object of the purchaſer, that where the principal ſubject of the contract was all the corn and hay tithes of a pariſh, and of the hay tithe half was allotted to the vicar, and the other half commuted for a cuſtomary payment, the nature of that payment

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payment, the extent of meadow, and the poſſible converſion from arable, not diſtinctly appearing, the injunction againſt recovering the depoſit, was continued after anſwer. *Drewe* v. *Hanſon*. *Page* 675

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Ambiguity.

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Anſwer.

1. The anſwer of an adminiſtrator to a creditor's bill, ſtating, that he believes the debt is due, whether that is ſufficient foundation for a decree, *Quære*. *Hill* v. *Binney*. 738
2. General denial not enough: there muſt be an anſwer to the ſifting inquiries upon the general queſtion. 792

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Appointment.

1. Teſtatrix gave a fund, over which ſhe had a power of appointment, and ſome ſpecific articles, to truſtees, in truſt for her reſiduary legatee after named; and gave the general reſidue to *A*. By a codicil ſhe revoked the bequeſt of the reſidue; and gave it to *A*. and *B*. *A*. was held ſolely entitled to the fund under the appointment. *Roach* v. *Haynes*. 153
2. Power of appointing real eſtate well executed by a deviſe to truſtees to ſell, and an appointment of the money produced by the ſale. *Kenworthy* v. *Bate*. 793
3. Settlement upon ſuch child or children as the father ſhould appoint: appointment excluding one eſtabliſhed. *Kenworthy* v. *Bate*. 793
4. Power to appoint land well executed by a charge. 797

Arbitration.

1. Order after an award to make the ſubmiſſion a rule of Court. *Pownall* v. *King*. *Page* 10
2. Upon a reference to arbitration, if the award is not made in the time and manner ſtipulated, no caſe at law or in equity, that the Court has ſubſtituted itſelf for the arbitrators, and made the award; even where the ſubſtantial thing to be done is agreed between the parties: ſtill leſs, where any thing ſubſtantial is to be ſettled by the arbitrators. 34
3. Award ſet aſide: the arbitrator having received evidence after notice to the parties, that he would receive no more; in which they acquieſced. *Walker* v. *Frobiſher*. 70
4. Under a reference to ſettle the matter in difference, and award ſuch alterations in the defendant's works as to the arbitrator ſhould ſeem neceſſary, regard being had to their ſtate at a particular period, an award directing no other alteration than that parts of the machinery, which were made of wood, ſhould be made of caſt iron, was held a due execution of the authority. *Walker* v. *Frobiſher*. 70
5. An award cannot be diſturbed for miſtake upon a queſtion of law referred. *Ching* v. *Ching*. 282
6. To a bill for diſcovery and relief plea of an agreement to refer to arbitration overruled. *Street* v. *Rigby*. 815
7. Bill for ſpecific performance of an agreement to refer to arbitration does not lie. 818
8. Courts of equity will not be ancillary to arbitrators, by permitting the party to take relief from them, coming to the Court for diſcovery. 821
9. Agreement to refer to arbitration does not bar an action. 822

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Aſſignee.

SEE *Bankrupt* 20. 26, 27, 28, 29, 30, 31.

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A perſon attainted may be charged in execution. 734

Attorney.

1. Motion to compel an attorney to produce papers of his client refuſed with coſts. *Wright* v. *Mayer*. *Page* 280

2. No *Subpœna duces tecum* upon an attorney to produce papers of his client. It has been ſometimes ſeen in a criminal caſe; but is not to be followed. 282

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Averment.

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Bailiff.

SEE *Account* 2.

Bank of England.

1. Notwithſtanding the Acts of Parliament 39 and 40 *Geo.* 3. *c.* 3. The Bank of *England* may ſtill be made parties to a bill to reſtrain a transfer of ſtock filed ſince that act. A demurrer by the Bank was therefore overruled. *Temple* v. *Bank of England.* 770

2. An application under the act 39 and 40 *Geo.* 3. *c.* 36. to reſtrain the Bank from making a transfer without making them parties muſt be upon notice to the defendants or on affidavit, as in caſes of waſte. *Hammond* v. *Maundrell.* 773

Banker.

SEE *Bankrupt* 31.

Bankrupt.

1. Regulations in bankruptcy. 1

2. Though unliquidated damages cannot be proved under a commiſſion of bankruptcy, yet, if the demand is partly of that nature, and partly liquidated, as the difference of price upon a reſale, the creditor having a ſecurity may apply it firſt to the former, then to the latter, and may prove the reſidue. *Ex parte Hunter.* 94

3. A fair diſſolution of partnerſhip between two: one retiring; and aſſigning the partnerſhip property to the other; and taking a bond for the value and a covenant of indemnity againſt the debts: the other continued the trade ſeparately a year and a half; and then became a bankrupt. The Lord Chancellor was of opinion, the joint creditors had no equity attaching upon partnerſhip effects remaining in ſpecie; and at all events ſuch a claim ought to be by a bill, not a petition. *Ex parte Ruffin.* *Page* 119

4. Debts are within the ſtatute 21 *Jam.* 1. *c.* 19. *ſ.* 10, 11. 128

5. Upon a ſeparate commiſſion of bankruptcy the benefit of an inſurance effected by the bankrupt upon his own account upon joint property is not liable to the joint creditors. *Ex parte Browne.* 136

6. Proof under the bankruptcy of one joint debtor after receiving a compoſition from the other expunged: the releaſe to one being a releaſe to both. *Ex parte Slater.* 146

7. Upon a ſecond bankruptcy no allowance to the bankrupt: the eſtate not paying 15*s.* in the pound. *Ex parte Gregg.* 238

8. *A.* to diſcharge a debt due from him to *B*, procures his banker *C.* to direct his correſpondent and partner *D.* to accept a bill drawn by *B.* Before the bill was due, *C.* and *D.* became bankrupt; *C.* being indebted to *A.* more than the amount of the bill. *B.* proved againſt the eſtate of *D.*; but afterwards received the whole from *A.* *A.* not having proved againſt the eſtate of *C.* in reſpect of the bill is entitled to ſtand in the place of *B.* againſt the eſtate of *D.*; whoſe proof having been expunged was reinſtated for the benefit of *A.* *Ex parte Matthews.* 285

9. Held in bankruptcy, that after a voluntary diſcharge by agreement the creditor cannot make uſe of a ſecurity againſt third perſons; where the effect would be to make the party diſcharged again liable, though in another form and in the ſhape of the demand of another perſon. 305

10. A commiſſion of bankruptcy ſuperſedeable under Lord *Loughborough*'s order, dated the 26th of *June* 1793, is not actually ſuperſeded, till the writ of ſuperſedeas iſſues; and therefore having been opened, and the bankruptcy

bankruptcy adjudged, after the order made for the ſuperſedeas, but before the writ ſealed, notice of the application having been according to the practice in the office ſent to the ſolicitor, the commiſſion was ſupported. *Ex parte Leiceſter.* *Page* 429

11. *Qu.* Whether the order of Lord *Apſley*, dated the 12th of *February* 1774, that a docket ſtruck, and no commiſſion iſſued thereon, ſhall in no caſe prevent a commiſſion by another creditor upon an application not made in leſs than four days, can be ſtrictly acted upon: the eſtabliſhed practice in the office being at variance with it; and there being danger of fraud. *Ex parte Leiceſter.* 429

12. An order for a Superſedeas has no effect, till the writ iſſues. *Ex parte Layton.* 434

13. A joint Commiſſion againſt two partners in *England*, another partner reſiding abroad, ſuperſeded. *Ex parte Layton.* 434

14. Where two commiſſions are taken out againſt the ſame party, the Court will execute a diſcretion, controlling the ſtrict right; and ſupport that, which is moſt convenient; if the objections to it can be removed by ſuperſeding the other. *Ex parte Layton.* 434

15. Abuſe of a Commiſſion by delaying the execution of it with a view to another arrangement. *Ex parte Layton.* 434

16. Where one partner is an infant, or lunatic, there cannot be a joint commiſſion of bankruptcy againſt the others; ſeparate commiſſions muſt be taken out. 440

17. The time enlarged for a bankrupt; who had omitted to finiſh his examination; but the order would not diſcharge a proſecution for the felony. *Ex parte Ricketts.* 445

18. Bankrupt ſurrendered in diſcharge of his bail, and diſcharged by the creditor; having never been charged in execution: this is no election; and the creditor was admitted to prove. *Ex parte Cundall.* 446

19. Creditor having ſecurities of third perſons to a greater amount than the debt may prove and receive dividends upon the full amount of the ſecurities to the extent of 20*s.* in the pound upon the actual debt. *Ex parte Bloxham.* 449

20. Order under ſtatute 5 *Geo.* 2. c. 30. *ſ.* 31., that new aſſignees may be choſen, and that the Commiſſioners may execute a new bargain and ſale and aſſignment, the former being vacated: all the aſſignees being dead; and the heir at law of the ſurvivor an infant. *Ex parte Bainbridge.* *Page* 451

21. A bankrupt pending a Commiſſion has a right to an inſpection in reſpect of the ſurplus; and the Lord Chancellor will take care, that at the cloſe of it he ſhall have juſtice: but in this caſe the bankrupt was not permitted to ſurcharge and falſify in the Maſter's Office the accounts ſettled by the Commiſſioners long ago: though palpable errors ſpecifically pointed out by a ſhort petition would be rectified. *Twogood* v. *Swanſton.* 485

22. Creditor having ſecurities of third perſons to a greater amount than the debt may prove and receive dividends upon the full amount of the ſecurities to the extent of 20*s.* in the pound upon the actual debt. *Ex parte Bloxham.* 600

23. Joint Commiſſion of Bankruptcy ſuperſeded on the ground of the infancy of one partner on the petition of the aſſignees under a ſeparate Commiſſion. *Ex parte Barwis.* 601

24. Bankrupt's certificate ſhall not be ſtaid, in order to give a perſon inſiſting on a right to ſtop *in tranſitu* an opportunity of proving, in caſe he ſhould fail in his action. *Ex parte Heath.* 613

25. General inſpection of a bankrupt's books, for the purpoſe of getting rid of the certificate by proving gambling tranſactions, refuſed. *Ex parte Mawſon.* 614

26. Sale by aſſignees under a bankruptcy by auction to one of the creditors, previouſly conſulted as to the mode of the ſale, and contrary to an order, that a Receiver ſhould be appointed to ſell: another ſale was directed: the eſtate to be put up at the aggregate amount of the purchaſe money and the ſum laid out in ſubſtantial improvements and repairs; which were to be allowed in caſe of a ſale at an advance: but if no farther bidding, the purchaſer to be held to his purchaſe. *Ex parte Hughes.* 617

27. Aſſignee of bankrupt inſtead of ſelling the eſtate taking a leaſe himſelf is anſwerable for profit or loſs. *Ex parte Hughes.* 617

28. Aſſignee of a bankrupt not juſtified in deferring a ſale; and in ſuch a caſe, if called

ed upon to ſell, will incur the peril of anſwering any depreciation. *Page* 622

29. As to a purchaſe by a truſtee of the truſt property the rule is, that it ſhall not prevail under any circumſtances, unleſs the connection appears ſatisfactorily to have been diſſolved, a tranſaction to be viewed with great jealouſy from the opportunity of acquiring knowledge as truſtee, or by univerſal conſent. But as againſt him it ſhall ſtand, as, if more cannot be obtained. The rule applies to all agents, and moſt ſtrictly to aſſignees in bankruptcy from their great power. In this inſtance, that of an aſſignee, another ſale was directed: the premiſes to be put up at the price he gave; and if no more bid, his purchaſe to ſtand. As he had bought them in at a former ſale at a higher price, when there was another bidder to a greater amount than the final purchaſe, *Quære,* how the aſſignee is to be charged as to that difference. *Ex parte Lacey.* 625

30. Aſſignee of a bankrupt purchaſing dividends is a truſtee for the creditors or bankrupt according to the circumſtances. *Ex parte Lacey.* 625

31. A banker receiving the money under a bankruptcy ought not to be an aſſignee. *Ex parte Lacey.* 625

32. Dividends declared upon a bill of exchange, though not received, muſt be deducted from the proof by the indorſee under another Commiſſion of Bankruptcy. *Ex parte Leers.* 644

33. The holder of a bill of exchange may be compelled to prove under the bankruptcy of the acceptor for the benefit of the drawer. 734

34. Witneſſes to prove the act of bankruptcy not having obeyed the ſummons of the commiſſioners an order was made, that they ſhould attend the commiſſioners. *Ex parte Lund.* 781

35. The juriſdiction of the Lord Chancellor in bankruptcy is diſtinct from that of the Court of Chancery. 782

36. Proof under a commiſſion of bankruptcy againſt an overſeer of the poor in reſpect of money in his hands at the time of his bankruptcy before the period of accounting. *Ex parte Ruleigh.* 811

37. Proof allowed under a commiſſion of bankruptcy in reſpect of a bill alleged to be loſt; but the moſt extenſive indemnity to be given; and to be ſettled by the commiſſioners. *Ex parte Greenway.* *Page* 812

38. Joint creditors admitted to prove under a ſeparate commiſſion for the purpoſe of keeping ſeparate accounts and aſſenting to or diſſenting from the certificate, but not to receive dividends with the ſeparate creditors. *Ex parte Clay.* 813

SEE *Partner* 4. *Principal and Surety* 1. 3.

Banns.

SEE *Marriage* 1. *Ward of Court* 1.

Bargain and Sale.

SEE *Purchaſe* 3.

Baron and Feme.

1. Proviſions by a marriage ſettlement not held a purchaſe of all the property of the wife; unleſs that purpoſe is expreſſed, or clearly imported. *Druce* v. *Deniſon.* 385

2. A proviſion by marriage ſettlement in lieu, bar and ſatisfaction, of all dower or thirds, which the wife might otherwiſe be entitled to out of all the real and perſonal eſtate, held to bar her intereſt in what was not diſpoſed of by the will of her huſband. *Druce* v. *Deniſon.* 385

3. Whether an agreement by a huſband for a leaſe of part of his wife's term will bind her after his death, as an actual leaſe does, and if ſo, whether the rent is his property, or ſurvives to her with the reverſion, *Quære.* *Druce* v. *Deniſon.* 385

4. The conſideration of marriage runs through the whole ſettlement; and eſpecially ſupports every proviſion with regard to the huſband and wife. She is intereſted in the proviſion for her huſband, enabling him to provide for her and the children; and it is not affected by ſubſequent events, as the death of the wife without children. *Nairn* v. *Prowſe.* 752

SEE *Dower* 1. *Evidence* 5. *Ward of Court.*

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SEE *Will.*

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Bible.

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Biddings.

1. Biddings opened in favour of a person, who was present at the sale. *Rigby* v. *McNamara.* *Page* 117

2. A person, who by opening the biddings has occasioned a resale at a considerable advance, though not himself the purchaser, is not entitled to costs. *Rigby* v. *McNamara.* 466

3. Upon opening biddings the Court refused to dispense with a deposit, or to order a trifling one, upon particular circumstances. *Anonymous.* 513

Bill of Exchange.

SEE *Acceptance* 1. *Bankrupt* 32, 33, 37.

Bill to perpetuate Testimony.

1. Bill to perpetuate testimony of the legitimacy of the plaintiffs, entitled in remainder in tail after an estate for life: Demurrer by the 7th and 8th in remainder after the plaintiffs and the other defendants, all infants, overruled: any interest, however slight, being sufficient. *Lord Dursley* v. *Fitzhardinge.* 251

2. The next of kin of a lunatic, however hopeless his condition, have no interest whatever in the property; and therefore cannot sustain a bill to perpetuate testimony. So an heir apparent cannot have a writ *de ventre inspiciendo.* But they may contract upon their expectations; and may perpetuate testimony with reference to the interest so created. 260

3. The Court will not perpetuate testimony of a right; which may be immediately barred by the defendant. 262

Bond.

No relief, where the interest goes beyond the penalty of a bond, if occasioned by the delay of the plaintiff, the obligor. 92

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Books.

SEE *Copyright.*

Boundaries.

SEE *Tenant* 1.

Breach of Covenant.

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C.

Cambridge.

SEE *Copyright.*

Certificate.

SEE *Bankrupt* 24, 25.

Cestui que Trust.

SEE *Trust.*

Chancery.

SEE *Practice* 32.

Charge.

Power to charge includes a power to sell. *Page* 797

SEE *Appointment* 4. *Legacy* 2. *Purchase* 2. *Revocation.*

Charity.

1. Trust by will for building or purchasing a chapel, where it may appear to the executors to be most wanted: if any overplus, to go towards the support of a faithful gospel minister, not exceeding 20*l.* a year; and if any farther surplus, for such charitable uses as the executors should think proper. The whole trust void, not only as to the real estate and a mortgage, but also as to the personal estate; and the real estate went to the heir at law; and the personal to the next of kin. *Chapman* v. *Brown.* 404

2. A long lease of a charity estate in 1715 at a great under-value decreed to be delivered up; and an account directed with just allowances. *Attorney General* v. *Green.* 452

SEE *Trust* 1.

Chattel.

SEE *Partner* 5.

Child.

SEE *Baron and Feme* 4. *Illegitimate Child.* *Portion.*

Chriſtian Name.

SEE *Will* 1.

Clergyman.

SEE *Marriage* 1. *Ward of Court* 1.

Clerk in Court.

SEE *Privilege* 1. *Solicitor* 1.

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Client.

SEE *Attorney* 1. *Fraud* 4.

Coal Mine.

SEE *Injunction* 4.

Commiſſion.

The execution of the commiſſion in a cauſe is the act of the Court, carried on by its miniſters. *Page* 30

Commiſſion of Bankrupt.

SEE *Bankrupt*.

Commiſſion of Lunacy.

SEE *Lunacy*.

Committee.

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Commons (Houſe of).

SEE *Demurrer* 6. *Qualification*.

Compenſation.

SEE *Agreement* 15. *Conſtruction* 2.

Confiſcation.

SEE *Creditor* 2.

Conſideration.

Diſtinction as to volunteers. The aſſiſtance of the Court cannot be had without conſideration to conſtitute a party *ceſtui que truſt*; as upon a voluntary covenant to transfer ſtock, *&c.* But if the legal conveyance is actually made, conſtituting the relation of truſtee and *ceſtui que truſt*, as if the ſtock is actually transferred, *&c.* though without conſideration, the equitable intereſt will be enforced. *Elliſon* v. *Elliſon.* *Page* 656

Conſtruction.

1. Legal inſtruments not to be conſtrued by the acts of the parties. 238
2. Conſtruction of a covenant in a leaſe, that if the leſſor ſhall be minded to ſet out any part of the premiſes for a ſtreet or ſtreets, or to ſet or ſell any part to build upon, he may reſume upon certain terms. If he reſumed, having a *bonâ fide* intention to build, though that cannot be acted upon, there is no Equity for the tenant. 2dly, The generality of the latter words are not reſtrained by the former to buildings of any particular ſpecies: therefore a contract with a Canal Company for the lands reſumed was enforced: warehouſes being within the meaning of the leaſe; and wharfs, at leaſt as appurtenant, and wanted for the enjoyment of the warehouſes. A compenſation was decreed for the land covered with water; and as to towing paths, and the banks of baſons, though ſtrictly ſubjects of compenſation, yet upon a rehearing and after great litigation the Court would not reverſe the decree, and direct another reference to the Maſter, merely on that account. *Gough* v. *The Worceſter and Birmingham Canal Company.* 354

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Contempt.

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Copyhold.

The want of a ſurrender of copyhold eſtate cannot be ſupplied for grand-children. *Perry* v. *Whitehead.* 544

SEE *Deviſe* 2.

Copyright.

1. Upon the anſwer to a bill by the Univerſities of *Oxford* and *Cambridge*, the King's Printer not joining, but being made a defendant,

fendant, an injunction, reſtraining the ſale in *England* of Bibles, Prayer Books, *&c.* printed by the King's Printer in *Scotland*, was continued to the hearing. *The Univerſities of Oxford and Cambridge* v. *Richardſon.* *Page* 689

2. Whether the Patents granted to the King's Printer veſt the copyright, or are merely authorities, *Quære.* 713

Corporation.

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Court, Foreign.

Preſumption, that the Courts of foreign countries decide according to law; but open to evidence. 730

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As to the effect of a covenant to forbear ſuit, *Quære.* 821

Covenant, Voluntary.

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Creditor.

1. A creditor prevented by the act of the Court from obtaining judgment put in the ſame ſituation, as if he had it. 93

2. The property of an *American* Loyaliſt having been confiſcated during the *American* War, ſubject to the claims of ſuch of his creditors, as were friendly to *American* Independence, to be made within a limited time, and in fact according to the evidence farther reſtrained to the inhabitants of the particular State, a bill to have bonds delivered up, or to compel the creditor to reſort in the firſt inſtance to the fund ariſing from the confiſcation, was diſmiſſed; on the ground, that it did not appear that the creditor had the clear means of making his demand effectual againſt that fund: the Lord Chancellor alſo expreſſing an opinion in favour of the right to ſue perſonally even in that caſe, againſt the authority of *Wright* v. *Nutt* (3 *Bro. C. C.* 326. 1 *Hen. Black.* 136.). *Wright* v. *Simpſon.* *Page* 714

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Debt.

Bequeſt of a debt, as it ſtood on a certain day good. 170

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Debtor.

1. Debtor two terms in priſon without being charged in execution is entitled to his diſcharge. 446

2. The general principle, on which a debtor to the eſtate cannot be made a defendant to a bill by a creditor or reſiduary legatee againſt the executor, unleſs colluſion, inſolvency, or ſome ſpecial caſe, applies equally to the caſe of a creditor overpaid by the executor. In a caſe of that ſort upon the circumſtances of ſuſpicion, particularly attending to the character of the creditor, as attorney and confidential agent to the teſtatrix, an iſſue was directed. *Alſager* v. *Rowley.* 748

SEE *Creditor.*

Deed.

SEE *Lien* 5. *Profert.* *Purchaſe* 1.

Demurrer.

1. Order for defendants to be at liberty to withdraw a demurrer ſet down to be argued on payment of coſts to be taxed. *Downes v. Eaſt India Company.* *Page* 586

2. No decree, where the defendant might have demurred. 686

3. General demurrer lies: the plaintiff being entitled to diſcovery, but not to the relief. 686

4. Demurrer *ore tenus.* *Pyle v. Price.* 779

5. No general rule, whether a demurrer for want of parties muſt ſtate the parties. 781

6. Bill by creditors by judgment, who had ſued out elegits, for a diſcovery of freehold eſtates; charging, that the defendant upon his election as member of Parliament, previouſly to the judgments, gave in his qualification; and if the eſtates compoſing it were conveyed away ſince, it was without conſideration. Demurrer as to the qualification, *&c.* and anſwer to the reſt; but not going to the charge of conveyance without conſideration: the demurrer was overruled. *Mountford v. Taylor.* 788

SEE *Bank of England* 1. *Partner* 5. *Pleading* 2. *Privilege.* *Truſt* 1.

Depoſit of Deeds.

SEE *Lien* 5.

Deviſe.

1. Under a general reſiduary diſpoſition by will to a natural ſon, his heirs, executors, adminiſtrators, and aſſigns, for ever, to and for his and their own proper uſe and behoof, a truſt eſtate does not paſs. *Ex parte Brettell.* 577

2. An eſtate held by copy of Court Roll, according to the cuſtom of the manor, but in caſe of inteſtacy diſtributable as perſonal eſtate, and in other reſpects differing from copyhold, paſſed under a reſiduary bequeſt of the perſonal eſtate, not with copyhold eſtates under a general deviſe of all freehold and copyhold meſſuages, lands, *&c.* with limitations in ſtrict ſettlement, upon the whole will and the circumſtances. *Watkins v. Lea.* 633

3. Deviſe of all freehold lands would include leaſes for lives; though the limitations are inapplicable. 642

SEE *Deviſe.* *Revocation.*

Diſcovery.

SEE *Account* 5. *Arbitration* 8. *Demurrer* 3. *Pleading* 2. 7.

Dividends.

SEE *Bankrupt* 30. 32.

Dower.

A widow not put to election between her dower and an annuity by the will of her huſband. For that the claim of dower muſt be inconſiſtent with the will. *Greatorex v. Cary.* *Page* 615

SEE *Account* 2. 4. *Baron and Feme* 2.

Drawer of Bill.

SEE *Bankrupt* 33.

E

Eccleſiaſtical Court.

SEE *Juriſdiction* 3. *Practice* 2.

Election.

In a caſe both of election and ſatisfaction by the will of a parent as to two ſubjects of claim by his younger children under a ſettlement, a caſe of election was raiſed as to a third ſubject, ſtock veſted in truſtees, upon the conſtruction of the will. *Pole v. Lord Somers.* 309

SEE *Dower* 1. *Bankrupt* 18.

Equitable Mortgage.

SEE *Lien* 5.

Equity.

SEE *Evidence* 1. *Juriſdiction* 1.

Error.

SEE *Bankrupt* 21.

Eſcheat.

Order upon petition for leave to traverſe an Inquiſition upon a Commiſſion of Eſcheat, found in favour of the Crown. *Ex parte Webſter.* 809

Eſtate pur auter vie.

1. An intereſt in an eſtate *pur auter vie*, that would be an eſtate tail, if applied to freehold lands of inheritance, may be diſpoſed of by deed. 158

2. An

2. An eſtate *pur auter vie* may be limited in tail. *Page* 158

SEE *Deviſe* 3. *Money to be laid out in land to be ſettled* 2.

Evidence.

1. A rule of property in Equity is not therefore to be adopted at Law: the Courts in ſome reſpects proceeding upon different principles: Courts of Equity for inſtance not allowing a ſingle witneſs, unleſs ſupported by circumſtances, to prevail againſt a poſitive denial by the anſwer. 183

2. The queſtion, whether evidence, *viz.* a ſchedule written by the teſtator ſubſequent to the will, could be admitted, was not decided. *Pole* v. *Lord Somers.* 309

3. Upon a preſumption of ſatisfaction by will evidence admiſſible: 1ſt, to conſtitute the fact, that the teſtator was debtor: 2dly, to meet or fortify the preſumption. 321

4. Evidence admitted upon equities ariſing out of preſumptions; and in the caſe of the next of kin and executor evidence between the will and the death of the teſtator, but as to his intention at the date of the will. 324

5. A ſtatement of property written by the teſtator, and his books of accounts, admitted as evidence, that he conſidered as his property, and meant to diſpoſe of, property, not ſtrictly, though in ſome ſenſe, his: *viz.* mortgages and leaſes, the property of his wife under a will, by which he was executor with her before marriage. *Druce* v. *Deniſon.* 385

6. Parol evidence admiſſible upon a latent, not upon a patent, ambiguity, to rebut Equities, grounded upon preſumption, and perhaps to ſupport the preſumption, to ouſt an implication, and to explain, what is parcel of the premiſes granted or conveyed. 397

7. Circumſtances not ſufficient evidence of a releaſe of a bond debt. *Reeves* v. *Brymer.* 516

8. A notary public has credit every where; but the certificate of a magiſtrate of a colony abroad requires evidence to his character. *Hutcheon* v. *Mannington.* 823

SEE *Agreement. Bill to perpetuate Teſtimony. Practice* 26. *Truſt* 2.

Examination de bene eſſe.

SEE *Practice* 26.

Exception.

SEE *Practice* 8. 14. 22. 35.

Exchange (Bill of).

SEE *Acceptance* 1. *Bankrupt* 32, 33.

Execution.

SEE *Attaint* 1. *Debtor* 1.

Executor.

1. Equal legacies to two executors make them truſtees of the reſidue undiſpoſed of; notwithſtanding inequality as to the real eſtate. So, though the legacies are given by a ſubſequent inſtrument. *Page* 64

2. Executor cannot buy the debts for his own benefit. 628

SEE *Debtor* 2. *Evidence* 4. *Reſulting Truſt. Truſt* 1.

Exemption.

To exempt the perſonal eſtate from the debts the will muſt ſhew that intention by indication plain: a proviſion for the debts out of the real eſtate is not ſufficient. *Brydges* v. *Phillips.* 567

F

Falſe Repreſentation.

SEE *Fraud* 1, 2.

Fees.

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Feme Covert.

SEE *Baron and Feme.*

Fine.

SEE *Renewal* 2.

Foreign Court.

SEE *Court (Foreign).*

Foreigner.

SEE *Ward of Court* 3.

Fraud.

1. An old head of Equity, that if a repreſentation is made to a man, going to deal on the

the faith of it in a matter of intereſt, the perſon making the repreſentation, knowing it falſe, ſhall make it good; and the juriſdiction aſſumed by Courts of Law in ſuch caſes will not prevent relief in Equity. *Page* 182

2. Conſequences of permitting an action for an injury ſuſtained by giving credit upon a falſe repreſentation by the defendant. 186
3. If the intention is fraudulent, though not pointing exactly to the object accompliſhed, yet the party is bound. 192
4. Sale of an annuity by an attorney to his client ſet aſide under the circumſtances. *Gibſon* v. *Jeyes.* 266
5. A ſeparate agreement, ſecuring to ſome creditors, who had executed a deed of compoſition, a greater advantage than the other creditors would have under the deed, and without their knowledge, cannot be enforced. *Mawſon* v. *Stock.* 300

SEE *Agreement* 8. *Debtor* 2. *Mortgage* 1. *Partner* 3. *Practice* 31. *Truſt* 2.

Frauds (Statute of).

SEE *Agreement* 1, 3, 4, 5, 6. 11. 14.

Free Maſon.

SEE *Partner* 5.

Friendly Society.

1. The ſtatute 33 *Geo.* 3. *c.* 54. giving preference to friendly ſocieties, having money due to them from their officers dying or becoming bankrupt or inſolvent, does not extend to debts due from them individually, and not in their official characters. *Ex parte The Amicable Society of Lancaſter.* 98
2. Whether the preference to friendly ſocieties under the ſtatute 33 *Geo.* 3. would prevail againſt the Crown, *Quære.* 99
3. A perſon, in the habit of receiving the money of a friendly ſociety, having no treaſurer appointed, upon notes carrying intereſt, payable a month after demand, is not an officer of the ſociety, ſo as to entitle them to a preference under the ſtatute 33 *Geo.* 3. *c.* 54. ſect. 10. *Ex parte Aſhley.* 441
4. Money paid by order of a friendly ſociety from time to time upon notes carrying intereſt, there being no treaſurer appointed, is not money in the hands of the party by virtue of any office within the act of Parliament 33 *Geo.* 3. *c.* 54. *ſ.* 10., entitling the ſociety to a preference in caſe of bankruptcy. *Ex parte Roſs.* *Page* 802

G

Grandchild.

No intereſt by way of maintenance upon a legacy ſimply to a grandchild or a natural child. 546

Great Seal.

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Heir.

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Holder of Bill.

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Houſe of Commons.

SEE *Demurrer* 6. *Qualification.*

Huſband.

SEE *Baron and Feme.* *Dower.*

I

Illegitimate Child.

An illegitimate child not entitled under the deſcription of a child in a will; though the teſtator knew the ſtate of the family, *viz.* ſeveral illegitimate and no legitimate children. *Godfrey* v. *Davis.* 43

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Impertinence.

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Impeachment of Waſte.

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Implication.

SEE *Legacy* 2. *Portion* 2. *Waſte.*

Indorſee.

SEE *Bankrupt* 32.

Infant.

Infant.

1. Perſonal property of an infant ordered to be laid out in the purchaſe of land; though there was no authority in the will for changing the nature of the property: but it was ordered, that the eſtate purchaſed ſhould be conveyed in truſt for the infant, his executors and adminiſtrators, till he ſhould attain twenty-one, and afterwards for him and his heirs. *Lord Aſhburton* v. *Lady Aſhburton*. *Page* 6
2. General rule, that a truſtee ſhall not of his own authority break in upon the capital of an infant's fortune. *Walker* v. *Witherell*. 473
3. The Court very rarely has broken in upon the capital for the mere purpoſe of maintenance, though frequently for advancement. 474

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Injunction.

1. Injunction to reſtrain waſte not granted againſt defendant in poſſeſſion, claiming by an adverſe title. *Pillſworth* v. *Hopton*. 51
2. The injunction, obtained upon a breach of covenant, in nature of a ſpecific performance, diſſolved upon the anſwer, contradicting the affidavits, and ſhewing conſent for ſeveral years. *Barret* v. *Blagrave*. 104
3. Injunction on affidavit to reſtrain the tenant of a farm from breaking up meadow, contrary to expreſs covenant, for the purpoſe of building. Whether, if no expreſs covenant, it would do upon the ground of waſte, *Quære*. *Lord Grey De Wilton* v. *Saxon*. 106
4. Injunction, where the defendant having begun to take coal in his own land had worked into that of the plaintiff. *Mitchell* v. *Dors*. 147
5. Injunction, where there can be no account. 705
6. Injunction to prevent that, which is unjuſtly done, or threatened. 706
7. Injunction granted or continued to the hearing, though the legal title doubtful; as upon patent rights. 707
8. Injunction to reſtrain waſte not granted without poſitive evidence of title. *Davis* v. *Leo*. 784

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Inquiſition.

SEE *Lunacy*.

Inſufficient Anſwer.

SEE *Practice* 20, 21.

Inſurance.

SEE *Bankrupt* 5.

Intereſt.

1. Deviſe in truſt to ſell, and apply the money to and among ſuch perſons as the truſtees in their diſcretion ſhould think had or have any juſt or indiſputable demand upon *A.* at his death, to each in equal degree and proportion according to the principal ſum, as far as the money would extend; the ſecurities to be delivered up: but the money to be given and received in no other manner than as voluntary bounty. The fund, being more than ſufficient, is liable to intereſt of bonds to the extent of the penalties. *Aſton* v. *Gregory*. *Page* 151
2. No intereſt beyond the penalty of a bond; except under ſpecial circumſtances. *Clarke* v. *Seton*. 411

SEE *Grandchild* 1. *Legacy* 3. *Veſting* 7.

Interpleader.

Upon a bill of interpleader the defendant, who made it neceſſary, was ordered to pay all the coſts; and the plaintiff has a lien for his coſts upon the fund paid into Court. *Aldridge* v. *Meſner*. 418

Interrogatories.

SEE *Practice* 22.

J

Joint Commiſſion.

SEE *Bankrupt*.

Joint Creditor.

SEE *Bankrupt* 3. 5, 6. *Partner*.

Joint Tenant.

Survivorſhip by words in a will creating a joint intereſt: the intention of ſeverance not

not being ſufficiently clear. *Whitmore* v. *Trelawny.* *Page* 129

Judgment.

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Juriſdiction.

1. Diſtinction in the adminiſtration of law and equity in this country by different Courts; and conſequences of that diſtinction. 39
2. The caſes, where the bill is retained, that there may be a trial at law, are, where it is neceſſary to eſtabliſh the legal right, in order to found the equitable relief; but, where the ſubject appeared to be matter of law, the bill was diſmiſſed. *Walton* v. *Law.* 150
3. Injunction reſtraining a transfer, and a receiver appointed, to preſerve the property during a litigation in the eccleſiaſtical Court upon the will. *King* v. *King.* 172

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K

King's Printer.

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Laches.

SEE *Bond* 1. *Mortgage* 1. *Revocation* 1. *Truſt* 6. *Will* 1.

Landlord and Tenant.

SEE *Injunction* 3. *Tenant.* *Waſte* 4.

Latent Ambiguity.

SEE *Evidence* 6.

Leaſe.

SEE *Renewal* 2.

Leaſe for Lives.

SEE *Deviſe* 3.

Legacy.

1. Bequeſt of an annuity of 200*l.* for the uſe of *A.* and her children, to be paid out of the general effects until it is convenient to the executors to inveſt 5,000*l.* in the funds in lieu thereof for her and their uſe, and to the longeſt liver, ſubject to an equal diviſion of the intereſt, while more than one alive: held an annuity, not an abſolute legacy. *Innes* v. *Mitchell.* *Page* 464
2. Charge of legacies by implication upon a fund ariſing from the accumulation of rents and profits, dividends and intereſt. The other queſtions were not determined: 1ſt, whether the real eſtate was charged by implication from words, which could be otherwiſe ſatisfied; and, if not, whether the will directing an eſtate to be purchaſed, and ſettled upon the teſtator's ſon with remainders over, for which the teſtator afterwards contracted, and the purchaſe money having been paid out of the perſonal eſtate under a power in the will for that purpoſe, the legatees by marſhalling could have the benefit of the vendor's lien upon the eſtate for the purchaſe money. *Auſten* v. *Halſey.* 475
3. General rule, that legacies, where no intereſt is given by the will, ſhall carry intereſt at 4 *per cent.* only, and from the end of a year after death of the teſtator, except where it is given by way of maintenance; though the fund produces more; and the intereſt ſhall not be increaſed by the effect of appropriation. *Sitwell* v. *Bernard.* 520
4. The Court will look at principles of convenience; as in the rule, that legacies ſhall be payable at the end of a year. 539
5. Legacy to *A.* or in caſe of his death to his iſſue, abſolute in the parent. *Turner* v. *Moor.* 557

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Legacy veſted.

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Legatee.

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Lien.

1. Lien under the uſual condition at an auction, that if the vendee ſhould fail to complete his purchaſe the vendor ſhould be at liberty to reſell; and the vendee pay the expences and make good the deficiency, &c. *Ex parte Hunter.* 94
2. No lien under the circumſtances. *Adams* v. *Claxton.* 226
3. Lien. *Ex parte Smith.* 447

4. Vendor's

4. Vendor's equitable lien upon the eſtate for the purchaſe money loſt by taking a ſpecial ſecurity by way of a pledge of ſtock. Whether every ſecurity would have that effect, *Quære*. *Nairn* v. *Prowſe*. *Page* 752

5. Whether the vendor's lien could prevail againſt an equitable mortgage by depoſit of deeds, *Quære*. *Nairn* v. *Prowſe*. 752

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Limitations (Statute of).

1. Whether tranſactions between principal and agent are within the exception in the ſtatute of limitations as to merchants' accounts, *Quære*. *Jones* v. *Pengree*. 580

2. Whether, in order to have the benefit of the exception in the ſtatute of limitations as to merchants' accounts, ſome tranſaction muſt have paſſed within ſix years, *Quære*. *Jones* v. *Pengree*. 580

SEE *Pleading* 4.

Lodge of Free-Maſons.

SEE *Partner* 5.

Loyaliſt (American).

SEE *Creditor* 2.

Lunacy.

1. Acceſs to a lunatic by a perſon entitled upon the death of the lunatic in default of appointment by her, to ſee, whether ſhe was in a ſtate to exerciſe the power, refuſed. *Ex parte Lyttleton*. 7

2. A liberal application of the property of a lunatic is to be made, to ſecure every comfort his ſituation will admit. *Ex parte Baker*. 8

3. The Court will not appoint a Maſter in Chancery to an office, in reſpect of which he will be liable to account; as, committee of a lunatic's eſtate. The Court refuſed to appoint a perſon committee of a lunatic, upon the circumſtances; particularly, that he had agreed to give part of the profits to another. *Ex parte Fletcher*. 427

4. Agreement by the committee of a lunatic, that coal under the lunatic's eſtate ſhould be worked by the owner of the adjoining land, eſtabliſhed under the circumſtances. *Ex parte Tabbert*. 428

5. Any fair and reaſonably provident application as to the execution of a commiſſion of lunacy is not diſcouraged: but in this inſtance the petition being wholly groundleſs was diſmiſſed with coſts. *Ex parte Ward*. *Page* 579

6. Whether a mere ſtranger having no intereſt would be permitted to traverſe an inquiſition of lunacy, *Quære*. *Ex parte Ward*. 579

7. Right to traverſe an inquiſition of lunacy under the ſtatute 2 *Edw*. 6. *c*. 8. *ſ*. 6. 580

8. Commiſſioners of lunatics have a power of ſummoning witneſſes as incident to their office. 784

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M

Magiſtrate of a Colony.

SEE *Evidence* 8.

Maintenance.

SEE *Grandchild* 1. *Infant* 3. *Legacy* 3. *Practice* 16. 19. *Veſting* 7.

Marriage.

By the Canon Law, which is binding on the clergy, it is highly criminal to celebrate marriage without a due publication of banns; which muſt ſuppoſe information as to the reſidence. Penalties by that law and the ſtatute law upon the clergyman. 423

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Marriage Settlement.

SEE *Baron and Feme* 1, 2. 4.

Maſter in Chancery.

SEE *Lunatic* 3.

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SEE *Demurrer* 6. *Qualification*.

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Meſne Profits.

Whether action for meſne profits can be maintained before judgment in ejectment, *Quære*. 91

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SEE *Account* 2. *Injunction* 4.

Miſtake.

SEE *Agreement* 8. *Arbitration* 5. *Will* 1.

Modus.

SEE *Tithes.*

Money paid into Court.

SEE *Practice* 31.

Money to be laid out in Land to be ſettled.

1. Under the ſtatute 40 *Geo.* 3. *c.* 56. authoriſing payment of money, to be laid out in land to be ſettled, to the tenant in tail, the order was thus qualified; in caſe he ſhould be living on the ſecond day of the enſuing term; and an inquiry as to incumbrances was directed. *Ex parte Bennet.* *Page* 116

2. The Court refuſed upon an *ex parte* petition to order money to be paid under the ſtatute 40 *Geo.* 3. *c.* 56.; the ſubject involving a doubtful queſtion, *viz.* the conſtruction of a truſt of an eſtate for lives, to permit two ſiſters to receive the rents for their lives; remainder to the heirs of their bodies; and in caſe they ſhould die without iſſue, from and after their deceaſe, over. *Ex parte Sterne.* 156

3. No order can be made under Lord *Eldon*'s Act, 40 *Geo.* 3. *c.* 56. authoriſing the payment of money, in truſt to be laid out in land, to be ſettled, to the tenant in tail, without a previous inquiry as to incumbrances. *Ex parte Hodges.* 576

Mortgage.

1. Not a general rule in equity, that a ſecond mortgagee, who has the title deeds, without notice of a prior incumbrance, ſhall be preferred: negligence alone will not poſtpone the firſt: it muſt amount to fraud. 183

2. In equity a ſecond mortgagee without notice getting in a ſatiſfied term may protect himſelf: the conſcience being equal. The Lord Chancellor of opinion, that at law an aſſignment of ſuch term is not to be preſumed, without ſome dealing upon it. Conſequences of the late doctrine of Courts of law on this ſubject. *Page* 184

3. Creditors under a deed of truſt cannot have a decree for redemption againſt a mortgagee; unleſs a ſpecial caſe; as colluſion; that the truſtee refuſes, &c. In this caſe the bill by the creditors prayed, not a redemption, but a ſale; to which the mortgagee would not conſent; but ſubmitted to be redeemed; and the bill was diſmiſſed. *Troughton* v. *Binkes.* 573

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Mortmain.

Truſt of real and perſonal eſtate by will, for the purpoſe of eſtabliſhing a perpetual Botanical Garden, declared void, upon the expreſſion of the teſtator, that he truſted it would be a public benefit. *Townley* v. *Bedwell.* 194

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Mutual Demands.

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Name miſtaken.

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Natural Child.

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Ne exeat regno.

A writ of *Ne exeat regno* refuſed upon an undertaking for an indemnity. To obtain it there muſt be an equitable demand in the nature of a debt actually due. *Cock* v. *Ravie.* 283

New Trial.

Upon a motion for a new trial for exceſſive damages the Court of law would take care, that the right of the plaintiff ſhould not be prejudiced by the death of the defendant. 90

Next of Kin.

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O

Obligor and Obligee.

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Opening Biddings.

SEE *Biddings.*

Original Will.

SEE *Practice* 2. 34.

Ornamental Timber.

SEE *Waſte* 1. 5.

Outſtanding Term.

SEE *Practice* 12.

Overſeer of the Poor.

SEE *Bankrupt* 36.

Oxford.

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P

Parliament.

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Parent and Child.

SEE *Portion.*

Parol Agreement.

SEE *Agreement.*

Parol Evidence.

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Part Performance.

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Partition.

No objection to a partition, that other perſons may come *in eſſe* and be entitled. *Wills* v. *Slade.* *Page* 498

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Pariſh Clerk.

SEE *Ward of Court* 1.

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1. Whether, and under what circumſtances, a trader can plead in abatement a partner abroad, *Quære.* *Page* 438
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Remainder.

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Reſulting Truſt.

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SEE *Renewal* 2. *Waſte* 2, 3. 5, 6.

Tenant in Common.

SEE *Joint-tenant* 1.

Term Outſtanding.

SEE *Practice* 12.

Term Reverſionary.

SEE *Portion* 1.

Term ſatisfied.

SEE *Mortgage* 2.

Teſtimony.

SEE *Bill to perpetuate*.

Timber.

SEE *Account* 2. *Waſte*.

Tithes.

1. Iſſue directed on a modus for certain lands, amounting to 1 *s. per* acre for all tithes; notwithſtanding the apparent rankneſs. *O'Connor* v. *Cook*. 665
2. Rankneſs of a modus is only evidence; not an objection in point of law. 672
3. Diſtinction as to rankneſs between a modus for tithe of particular things and a farm modus. 672

SEE *Account* 2. *Agreement* 15.

Title.

SEE *Practice* 30.

Title Deeds.

SEE *Lien* 5. *Purchaſe* 1.

Transfer of Stock.

SEE *Bank of England* 1, 2.

Traverſe.

SEE *Eſcheat. Lunacy* 6, 7.

Treſpaſs.

No action of treſpaſs for meſne profits againſt the executor. *Page* 86

SEE *Injunction* 4.

Trial.

It is not a neceſſary conſequence, that the bill will not be diſmiſſed, becauſe it has been retained for the purpoſe of a trial at Law. 225

Truſt and Truſtee.

1. Bill by the heir at law againſt reſiduary deviſees, legatees, and executors; ſuggeſting a ſecret truſt, undertaken at the requeſt of the teſtator, either not legally declared, or, if ſo, void as to the real eſtate, and written acknowledgements by the defendants of an intended truſt for charitable purpoſes: the will alſo by equal legacies to them and ſome particular expreſſions importing a truſt. A general demurrer to the diſcovery and relief was overruled. *Muckleſton* v. *Brown.* 52

2. Bill to charge a truſtee, as having by delivering the title deeds to the tenant for life enabled him to make a mortgage of a ſettled eſtate as tenant in fee, diſmiſſed; the fraudulent purpoſe of enabling him to mortgage reſting upon the evidence of a ſingle witneſs, and being poſitively denied by the anſwer; as far as the allegations of the bill gave an opportunity of anſwering; but without coſts, on the ground of negligence; and without prejudice to an action; and with an option to the plaintiff to take an iſſue. *Evans* v. *Bicknell.* 174

3. Truſtee not charged with a loſs by the failure of the banker to the agent; in whoſe hands the money was depoſited pending a tranſaction for the change of a truſtee. *Adams* v. *Claxton.* *Page* 226

4. General rule, that he, who bargains in matter of advantage with a perſon placing confidence in him, is bound to ſhew, that a reaſonable uſe has been made of that confidence. 278

5. On motion a reference directed to inquire, whether the defendant, a truſtee, remains accountable for any acts done by him as truſtee, and, if not, to ſettle a releaſe. —— v. *Oſborne.* 455

6. Truſtees charged with a loſs occaſioned by their negligence, though without any corrupt motive. The coſts followed of courſe. *Caffrey* v. *Darby.* 488

7. General rule upon a purchaſe of truſt property by the truſtees on their own account, that at the option of the *Ceſtuy que Truſt* it ſhall be reſold; being put up at the price, at which the truſtees purchaſed: who, if there is no advance, ſhall be held to their purchaſe. *Liſter* v. *Liſter.* 631

8. In general caſes truſts will not fail by the failure of the truſtee. 663

SEE *Bankrupt* 26, 27, 28, 29, 30, 31, 32. *Conſideration* 1. *Deviſe* 1. *Executor* 1, 2. *Infant* 2. *Reſulting Truſt. Waſte* 3.

U

Union of Great Britain and Ireland.

SEE *Patent* 3.

Univerſities.

SEE *Copyright.*

Uſe.

SEE *Superſtitious Uſe.*

V

Vendor and Vendee.

SEE *Agreement* 10. *Legacy* 2. *Lien* 4, 5. *Purchaſe.*

Ventre inſpiciendo (Writ).

SEE *Bill to perpetuate Teſtimony* 2.

Veſting.

1. A bequeſt to a particular deſcription of perſons at a particular time veſts in perſons anſwering the deſcription at that time excluſively,

cluſively. Therefore an annuity being bequeathed over upon the death of the annuitant to the eldeſt child of *A.*, there being at the death no child, an after-born child is not entitled. *Godfrey* v. *Davis.* *Page* 43

2. Deviſe and bequeſt until a certain period from the nature of the purpoſe and circumſtances not tranſmiſſible to repreſentatives. *Ex parte Davies.* 147

3. A reſiduary bequeſt upon the whole will veſted only as the property was received: one of the reſiduary legatees therefore being dead, his repreſentatives were entitled only to that part, which was got in before his death. *Gaſkell* v. *Harman.* 159

4. The word “when” in a will, alone and unqualified, is conditional: but it may be controlled by expreſſions and circumſtances: ſo as to poſtpone payment or poſſeſſion only, and not the veſting: as, where the intereſt of the legacy in the interval was directed to be laid out at the diſcretion of the executors for the benefit of the legatees, it veſted immediately. *Hanſon* v. *Graham.* 239

5. In the Civil Law the words “cum” and “ſi,” as referred to legacies, are equivalent; and from that law this rule and moſt of our other rules upon legacies are borrowed. 243

6. Diſtinction between a legacy at twenty-one and payable at twenty-one, borrowed from the Civil Law, but diſapproved. 245

7. A direction for maintenance has not the ſame effect in favour of veſting as giving intereſt. 249

8. Legacy after limitations for life and in default of children to be paid equally between two perſons or the whole to the ſurvivor of them, held not veſted till the time of diviſion. *Daniell* v. *Daniell.* 297

9. Bequeſt to *A.*, her executors, *&c.* provided, that in caſe ſhe ſhall die under twenty-one or without leaving any huſband living at her death, it ſhall go over, veſted at twenty-one upon the intention: the word “or” being conſtrued “and.” *Weddell* v. *Mundy.* 341

10. A bequeſt for all and every the child and children of *A.* includes every child born before the period of diſtribution; which in this caſe was the attainment of the age of twenty-one by the eldeſt, the marriage of a daughter, or the death of a child under twenty-one, leaving iſſue. Upon the general rule a child by a ſubſequent marriage was included, notwithſtanding a ſtrong implication in favour of children by the prior marriage. *Barrington* v. *Triſtram.* *Page* 345

11. Teſtator directed the reſidue of his perſonal eſtate, ſubject to the payment of legacies, annuities, debts and funeral expences, with all convenient ſpeed to be laid out in real eſtates, to be ſettled in ſtrict ſettlement; and that the intereſt of ſuch reſidue ſhould accumulate, and be laid out in lands to be ſettled in like manner. Various circumſtances having delayed the collection and inveſtment of the perſonal eſtate, the tenant for life was held entitled to the intereſt from the end of a year after the death of the teſtator. *Sitwell* v. *Bernard.* 520

SEE *Legacy* 5. *Portion* 1, 2.

Voluntary Settlement.

SEE *Conſideration* 1.

W

Ward of Court.

1. Upon a marriage of a ward of the Court under flagrant circumſtances, the clergyman and clerk were ordered to attend: the huſband was committed; and the Lord Chancellor directed the proceedings to be laid before the Attorney General; expreſſing his opinion, that contriving a marriage without a due publication of banns is a conſpiracy at Common Law. *Prieſtley* v. *Lamb.* 421

2. In the caſe of a ward of the Court a marriage in fact is ſufficient to ground the contempt. *Salles* v. *Savignon.* 572

3. Upon the marriage of a ward of the Court, both parties being foreigners, and the property abroad, and the marriage in *Scotland* on the day the bill was filed, the Court took juriſdiction; but did not commit the huſband; ordering him to attend from time to time, and to be at liberty to make a propoſal. *Salles* v. *Savignon.* 572

Waſte.

1. Injunction reſtraining tenant for life without impeachment of waſte from cutting timber

timber growing for ornament or ſhelter, extended to clumps of firs on a common two miles from the houſe, having been planted for ornament. *Marquis of Downſhire* v. *Lady Sandys.* *Page* 107

2. The power of tenant for life under the general words "without impeachment of waſte," not enlarged by implication from more extenſive powers given to truſtees for ſpecial purpoſes after her death. *Marquis of Downſhire* v. *Lady Sandys.* 107

3. Difference between the powers of tenant for life without impeachment of waſte and truſtees under the ſame words; the latter are bound to a provident execution of their powers. 115

4. Injunction againſt ploughing up paſture upon a covenant to manage in a huſbandlike manner. *Drury* v. *Molins.* 328

5. Injunction to reſtrain tenant for life without impeachment of waſte from cutting timber or other trees planted or growing for ſhelter or ornament, and from cutting except in a huſbandlike manner. *Lord Tamworth* v. *Lord Ferrers.* 419

6. Injunction againſt waſte in favour of tenant for life particularly as to ornamental timber; not ſo much upon his intereſt as his enjoyment. 787

SEE *Bank of England* 2. *Injunction* 1. 3, 4. 8. *Practice* 2.

Widow.

SEE *Dower.*

Wife.

SEE *Baron and Feme.* *Dower.*

Will.

1. Though the Chriſtian name of the legatee was miſtaken in the will, the legacy was eſtabliſhed upon the deſcription and evidence; notwithſtanding great delay in filing the bill. *Smith* v. *Coney.* 42

2. Rules of conſtruction of wills:—Every word to have effect, if not inconſiſtent with the general intention; which is to control: If two parts are totally inconſiſtent, the latter prevails: If a meaning can be collected, but it is wholly doubtful, in what manner it is to take effect, it is void for uncertainty. *Conſtantine* v. *Conſtantine.* 100

3. General words controlled, in order to make the whole will conſiſtent. *Whitmore* v. *Trelawny.* *Page* 129

4. If a teſtator by a paper ſubſequent to his will ſays, he has bequeathed that, which he has not bequeathed, that paper may be proved as teſtamentary; and the property will paſs. 397

5. Bequeſt of the debt, which ſhall be owing on a particular day, taken, as it ſtood on that day; and not affected by conſignments from the *Weſt Indies* on account ſince the death of the teſtator, which happened previous to the day ſpecified. *Innes* v. *Mitchell.* 461

6. Legacies out of real eſtate, given by an unatteſted paper, cannot ſtand, unleſs that paper is clearly referred to by a will duly executed; ſo as to be incorporated with it: in this inſtance there being no ſuch clear reference upon the contents of the inſtrument, the legacies failed: the circumſtance, that a paper was found incloſed in the ſame cover with the will, indorſed as his will, not being ſufficient. *Smart* v. *Prujean.* 560

7. A codicil expreſſed in the event of the teſtator's death, before he joins his wife, was executed after their ſeparation in the *Weſt Indies* upon his voyage for *England.* That voyage being prevented by accident, he joined her: they lived together there and in *England,* having returned together; and the teſtator having afterwards gone to *Corſica,* and thence to *Liſbon,* died there. The codicil was held to be contingent, and did not take effect under the circumſtances. *Sinclair* v. *Hone.* 607

8. Probate not concluſive; not being refuſed except in a plain caſe. *Sinclair* v. *Hone.* 607

9. Bequeſt to the teſtator's wife, if living at his deceaſe, provided ſhe continued his widow: but if ſhe ſhould die before his deceaſe, or afterwards marry again, then and in either of ſuch caſes to his father "if he ſhall be living at the time of my deceaſe or of ſuch marriage as aforeſaid, and in caſe he ſhall not be then living I give and bequeath the ſame to my brother." The father ſurvived the teſtator: but died before the marriage of the widow.

Upon her marriage the brother entitled. *Pyle* v. *Price*. Page 779

SEE *Appointment* 1. *Construction.* *Debt* 1. *Devise.* *Evidence.* *Exemption* 1. *Illegitimate Child* 1. *Legacy.* *Practice* 2. 34. *Revocation* 8. *Vesting.*

Witness.

Witnesses ought not to disclose their evidence to parties. 32

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Writ of Ne exeat regno.

SEE *Ne exeat regno.*

END OF THE SIXTH VOLUME.

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